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Supreme Court of the United States

OCTOBER TERM, 1954

No. 31

BALTIMORE CONTRACTORS, INC., PETITIONER,

vs.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 8, 1954

CERTIORARI GRANTED APRIL 12, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

BALTIMORE CONTRACTORS, INC., PETITIONER,

vs.

JACOB H. BODINGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Action No. 13508

JACOB H. BODINGER, Appellee,

against

BALTIMORE CONTRACTORS, INC., Appellant

NOTICE OF MOTION TO DISMISS APPEAL

SIRS:

Please take notice, that upon the Notice of Appeal herein, upon the order of Judge Walter J. Bruchhausen, of the United States District Court for the Eastern District of New York, dated the 4th day of November, 1953, and upon the annexed affidavit of Bernard I. Scherer, sworn to the 1st day of December, 1953, the undersigned will move this Court at a stated term thereof, to be held in the Court Room at the United States Courthouse, Foley Square, New York City, on the 7th day of December, 1953, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the appeal taken by the defendant-appellant from the order of Judge Bruchhausen dated the 4th day of November, 1953, on the ground that the said order is not appealable and that therefore this court has no juridiction of the said appeal, and granting the costs of this motion, and such other and further relief as to the Court may seem proper.

Dated, Brooklyn, N. Y., December 1st, 1953.

Yours, etc., Bernard I. Scherer, Attorney for Plaintiff-Appellee, Office and P. O. Address, 320 Broadway, Borough of Manhattan, City of New York.

To: Rosston, Hort and Brussel, Esqs., Attorney for Defendant-Appellant, 141 Broadway, New York City.

[fol. 2] AFFIDAVIT OF BERNARD I. SCHERER

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Action No. 13508

JACOB H. BODINGER, Appellee,

against

BALTIMORE CONTRACTORS, INC., Appellant

STATE OF NEW YORK
County of Kings, ss.

Bernard I. Scherer, being duly sworn, deposes and says:

1) I am an attorney at law, with offices at 320 Broadway, New York, N. Y., and am the attorney for the plaintiff-appellee in the above entitled action, and I am familiar with the proceedings in this action. This affidavit is made by me instead of the plaintiff-appellee since it relates to legal and procedural matters. It is made in support of the motion by plaintiff-appellee to dismiss the appeal taken herein.

2) The Notice of Appeal, copy of which is attached hereto as Exhibit "A", states that it appeals from an order denying defendant-appellant's motion for a stay of proceedings in this action.

The order from which the appeal is taken, made on the 4th day of November, 1953, copy of which is hereto annexed as Exhibit "B", shows that it denied a motion by the defendant for an order staying the prosecution of the action herein pursuant to the provisions of Section 3, of title 9, U. S. C. A., upon the alleged grounds that the agreement annexed to the complaint contains a provision for the arbitration of the disputes raised by the allegations of the complaint herein. This motion to dismiss the appeal must be [fol. 3] granted, because the order from which the appeal has been taken is neither a final decision nor an appealable interlocutory decision and therefore, this Court lacks jurisdiction of the appeal.

3) This lawsuit is an action in equity brought by plaintiff for an accounting by defendant of the profits of the joint adventure in which plaintiff and defendant had been en-

gaged, as more particularly appears from the complaint herein, copy of which is hereto annexed as Exhibit "C". The contract for the said joint adventure is annexed to the said complaint as Exhibit "1" thereof.

4) This action was commenced in the Supreme Court of the State of New York, County of New York, in April, 1953. The defendant, a domestic corporation of the State of Maryland, caused this action to be removed on the grounds of diversity of citizenship, to the United States District Court for the Eastern District of New York, where it now is pending.

5) The defendant has served no answer or pleading of any kind herein. Instead, on or about June 9th, almost three months after this action was commenced, it mailed to the plaintiff a so-called "Notice of Appointment of Arbitrators"; and thereupon on June 10th, made a motion for a stay of the prosecution of this action pursuant to the provisions of the National Arbitration Act (Section 3 of title 9, U. S. C. A.), upon the alleged grounds that the agreement annexed to the complaint contains a provision for the arbitration of the disputes raised by the allegations of the complaint. The said contract provision, which defendant claims constitutes an agreement to arbitrate, and based upon which it purportedly gave the said "Notice of Appointment of Arbitrators", is contained in the fourth sentence of Paragraph "Third" [fol. 4] of the contract annexed to the complaint, and reads as follows:

> "In the event of any dispute in the calculation of net profits under this Paragraph, Frenkil (defendant's President) shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute." (Insertion in parentheses ours)

6) Defendant's said motion for a stay pursuant to the Arbitration Act was argued before Judge Bruchhausen on October 7th, 1953, and decided by his memorandum opinion dated October 27th, 1953, copy of which is attached hereto as Exhibit "D". The order from which the appeal purports

to be taken, dated November 4th, 1953, was entered upon that opinion.

Appellee accordingly prays that this Court dismiss the appeal taken herein.

Bernard I. Scherer.

Sworn to before me this 1st day of December, 1953. Martin Hirsch, Notary Public, State of New York, No. 03-1806801. Qualified in Bronx County.

Commission Expires March 30, 1965.

[fol. 5] EXHIBIT "A" TO AFFIDAVIT

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

Civil Action No. 13508

JACOB H. BODINGER, Plaintiff,

against

BALTIMORE CONTRACTORS, INC., Defendant

NOTICE OF APPEAL TO THE COURT OF APPEALS

Notice is hereby given that Baltimore Contractors, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order denying its motion for a stay of proceedings entered in this action on the 4th day of November, 1953.

Rosston, Hort and Brussell, By George Brussel, Jr., a member of the firm, 141 Broadway, New York 6, New York, Attorneys for Appellant.

Dated: November 6, 1953.

Service of copy of the above Notice of Appeal made this 30 day of November, 1953.

Bernard I. Scherer, 320 Broadway, Borough of Manhattan, New York City, Attorney for Appellee.

[fol. 6] EXHIBIT "B" TO AFFIDAVIT

At a Term of the United States District Court for the Eastern District of New York, held at the United States Courthouse, Washington and Johnson Streets, Brooklyn, New York, on 4th day of November, 1953.

Present: Hon. Walter Bruchhausen, United States District Judge.

Civil Action No. 13508

JACOB H. BODINGER, Plaintiff,

against

BALTIMORE CONTRACTORS, INC., Defendant

The defendant having moved this Court for an order (1) staying the prosecution of this action pursuant to the provisions of Section 3 of Title 9, U. S. C. A., upon the alleged grounds that the agreement annexed to the complaint and upon which this action is based contains a provision for the arbitration of the disputes raised by the allegations of the complaint herein, or (2) in the event such relief be denied that defendant be allowed twenty days after the entry of an order upon said motion within which to answer the complaint; and the said motion having duly come on to be heard before this Court on the 7th day of October, 1953;

Now, upon reading and filing the Notice of said motion dated June 10, 1953, and the affidavit thereto annexed of Victor Frenkil, verified June 9, 1953, submitted in support of said motion; and upon the affidavits of Jacob H. Bodinger verified October 5, 1953 and the affidavit of Albert E. Selenkow verified October 3, 1953, submitted in opposition [fol. 7] to said motion; and upon the reply affidavits of Victor Frenkil verified October 13, 1953, of Ernest E. Wooden, verified October 12, 1953, and of Morris Rosenberg verified October 13, 1953, submitted in further support of the said motion; and upon the rebuttal affidavits of Jacob H. Bodinger verified October 20, 1953, Roszel C. Thomsen verified October 19, 1953, Albert E. Selenkow verified October 17, 1953 and of Bernard I. Scherer and Charles Wilson verified October 20, 1953, all submitted in further opposition

to the said motion; and upon the affidavit of C. M. Zacharski, Jr., verified October 23, 1953, submitted in further support of the said motion; and upon the complaint in this action and the agreement thereto annexed, and all the papers and proceedings had herein; and after hearing Rosston, Hort & Brussel, Esqs., attorneys for the defendant, by Morris Rosenberg, Esq. of counsel, in support of the said motion, and Bernard I. Scherer, Esq. by Charles Wilson, Esq. of counsel, in opposition thereto; and due deliberation having been had; and this Court being satisfied that the contract provision upon which the said motion is based does not constitute an agreement to arbitrate, and having made and filed its decision in writing dated October 27, 1953; it is

On motion of Bernard I. Scherer, attorney for the plaintiff,

Ordered, that defendant's motion for a stay of this action be, and the same hereby is in all respects denied; and it is further

Ordered, that the defendant be allowed twenty days after [fol. 8] the entry of this order within which to answer the complaint herein.

Walter Bruchhausen, U. S. D. J.

[fol. 9] EXHIBIT "C" TO AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

JACOB H. BODINGER, Plaintiff,

against

BALTIMORE CONTRACTORS, INC., Defendant

Plaintiff, by Bernard I. Scherer, his attorney, complaining of the defendant, alleges:

First. That plaintiff is a resident of the County of Kings in the City and State of New York.

Second. Upon information and belief that at all the times hereinafter mentioned the defendant was and still is a foreign corporation, duly organized and existing under and

by virtue of the laws of the State of Maryland; and that prior hereto and on or about the 21st day of May, 1951, defendant procured from the Secretary of State of New York a certificate that defendant has duly complied with all the requirements of law to authorize defendant to do business in this State in accordance with the provisions of the General Corporation Law of the State of New York, and that since the said 21st day of May, 1951, the defendant was and still is authorized to do business in the State of New York.

Third. Upon information and belief that defendant has its office within the State of New York, in the County of New York.

Fourth. That during or about 1949, plaintiff and defendant entered into a joint venture or enterprise for the construction of an apartment house upon a plot of land bounded by University Parkway, St. Paul's Street, 34th Street and Calvert Street, in the City of Baltimore, State of Maryland, [fol. 10] owned by Parkway Realty Co. Inc. (a Maryland corporation) and to be leased to Maryland Apartments Inc., (a Maryland corporation) for a term of ninety-nine (99) years; and that agreement between the plaintiff and the defendant for the said joint venture or enterprise was finally reduced to writing on or about March 2, 1950 and was duly entered into and executed by the plaintiff and defendant, among others, on or about that date, and annexed hereto as Exhibit "I".

Fifth. That among other things in said agreement, it was duly provided and agreed between the plaintiff and defendant as follows:

> "In the event Baltimore Contractors or any other corporation or corporations owned or controlled by Baltimore Contractors and/or by Frenkil shall obtain or receive any contracts in connection with the construction of the aforementioned property, Baltimore Contractors agree to pay Bodinger twenty-five per cent (25%) of the net profits received under said contracts. Any and all fees which such corporation or corporations shall receive in connection with the aforesaid construction shall be included as part of the receipts in calculating said profits which shall be calculated in

accordance with the usual accounting practice of Baltimore Contractors. It is also understood and agreed that in calculating said net profits two per cent (2%) of all receipts is hereby agreed to be deducted as the overhead expense of Baltimore Contractors in performing the work and said percentage shall include and cover all items and costs ordinarily included in overhead in accordance with the usual accounting practice of Baltimore Contractors. In the event of any dispute in the calculation of the net profits under this Paragraph, Frenkil shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute. It is understood and agreed that Bodinger's said 25% of such net profits, if any, and only to the extent necessary, shall be used to purchase from Baltimore Contractors and/or Frenkil or the holder of such indebtedness 25% of the balance of the indebtedness and interest at face value owing by either or both Parkway Realty or Maryland Apartments at the time such net profits are determined, and any excess of the net profits not required to purchase the said 25% of the balance of the indebtedness and interest thereon shall be paid over to Bodinger or his designee."

[fol. 11] The plaintiff in the above quoted provision of said contract is designated and referred to therein as "Bodinger"; the defendant is designated and referred to therein as "Baltimore Contractors"; the defendant's President, Victor Frenkil is therein designated and referred to as "Frenkil"; the property therein designated and referred to as "property" is the property described in paragraph "second" of this complaint; and the construction referred to in the said paragraph of said contract is the construction of the aforesaid apartment building.

Sixth. That thereafter and as contemplated by the said contract between plaintiff and defendant, a general contract for the construction of the said apartment building was given to the defendant Baltimore Contractors, Inc., which completed the construction of the said apartment building during or about November, 1951.

Seventh. That the plaintiff has duly performed all the terms and conditions of the said contract between plaintiff and defendant on plaintiff's part to be performed.

Eighth. That by reason of the said contract between plaintiff and the defendant, plaintiff became, upon the completion of the said apartment building, and still is, entitled to receive from the defendant, Baltimore Contractors, Inc., twenty-five (25%) of the net profits received and derived by the defendant, Baltimore Contractors, Inc. and any other corporation controlled by the defendant and or its president, Victor Frenkil, in connection with the said construction.

Ninth. That plaintiff heretofore duly requested and demanded of the defendant, Baltimore Contractors, Inc., an accounting of and for the said profits and the right to an inspection and audit of the books and records concerning the said construction, but that defendant failed and refused to furnish plaintiff with any full, proper or adequate accounting.

[fol. 12] Tenth. That although defendant subsequent to November 15, 1951 at first permitted plaintiff's accountant to commence upon an audit of the books and records of the defendant with reference to the said construction, defendant terminated the said audit and inspection and refused permission for the same to continue without just cause before any substantial portion of the said audit and inspection could be accomplished by plaintiff's accountant.

Eleventh. That thereafter and during or about April 1952, plaintiff received from the defendant a single sheet entitled "Baltimore Contractors, Inc., Tentative Calculations of Cost and Profit on job No. 3220, Maryland Apartments, Inc., March 14, 1950 to December 31, 1951", and in May, 1952, defendant sent to plaintiff a similar sheet with the word "tentative" omitted from the sheet title and a note appended to the bottom indicating that the statement was "subject to further adjustments relating to additional items of cost or credits arising either prior to or subsequent to December 31, 1951." Neither of said statements were signed or certified to by any one; and both were so general, containing only lump sums for large and important items, as to prevent plaintiff from ascertaining therefrom what items

were included in the said general totals and whether or not any of said items were proper or should be disputed or disallowed, and further, both the said statements upon their face showed that neither thereof purports to be a full, complete and proper accounting.

Twelfth. That thereafter defendant, refusing to permit plaintiff's original accountant to complete his audit and inspection of the books and records of the defendant pertaining to the said construction required the plaintiff to employ new accountants for the purpose of making such an audit and although the defendant thereafter permitted such new accountants to examine some of the records of the defendant [fol. 13] in connection with the said construction, it refused permission to the said accountant to examine other material books and records of the defendant which are material and relevant to and necessary for the completion of a proper audit of the profits of the said construction and for a complete ascertainment and determination of the amount of such profits.

Thirteenth. That the said partial audit and inspection which plaintiff's new accountants were permitted to make as aforesaid, together with other information of which plaintiff is informed and verily believes, nevertheless, disclosed the following methods and practices employed by the defendant in setting up alleged costs to be deducted from the profits of the said construction, in an attempt to conceal the amount which plaintiff was and is entitled to receive under the aforesaid contract between the plaintiff and the defendant.

a) That Eden Industries, Inc., (a Maryland Corporation), which upon information and belief, is substantially controlled by or a "dummy" for the defendant and or its president, Victor Frankil, was used by the defendant as the ostensible sub-contractor for the painting work performed as part of the said construction, and, in turn, the said Eden Industries, Inc., sub-contracted the said work to the actual contractor which was entitled to perform the said painting work and with whom the defendant had directly negotiated the said painting work; and that, upon information and belief, the said Eden Industries, Inc. performed no real function whatsoever in connection with the said business

and was received so used to inflate the actual cost of said job and to conceal a substantial part of the profits of said job and deprive the plaintiff of his share thereof; and, upon information and belief, that the said Exeen Industries, Inc., received as a profit from the said job, the sum of Twenty-eight Thousand ($28,000.00) Dollars which sum is not a true cost of the said construction work, although it is recorded as such in the books and records of the defendant. [fol. 14] b) The defendant charged against the said job the full cost of certain equipment purchased by the defendant during the said construction and retained by the defendant after the completion of said construction, although the said equipment continued to be of substantial value after the completion of the said construction, and, upon information and belief, was being used by the defendant on other work of the defendant with which plaintiff was not concerned, without allowing any credit to the construction cost herein involved for the continued value or use of said equipment.

c) That the defendant purchased various material in quantities substantially in excess of those required for the construction herein involved and removed such excess quantities of materials to defendant's own storage yards and upon information and belief used the same on other jobs with which plaintiff had no connection, without crediting the cost of construction herein involved with the value of such excess materials.

d) That the books and records of the defendant with respect to the costs of said construction work failed to record as credits against such costs a rebate received by defendant from one of its sub-contractors in the sum of Thirty-four Thousand Eight Hundred Forty-three and 73/100 ($34,843.73) Dollars of the sum received by such sub-contractor in connection with the said construction work.

e) That the books and records of the defendant with respect to the costs of said construction work failed to record as credits against such costs a rebate in the sum of Twenty Thousand ($20,000.00) Dollars paid and to be paid by Moss-Rouss Company in connection with the said property.

f) That the defendant made a practice of charging as costs of the said construction rental charges for equipment owned

by the defendant at rates which were substantially, if not [fol. 15] entirely, a profit to the defendant without allowing any credit for such profit against such costs or to the plaintiff in computing his share of such profits, i.e., so that rental charges of $60.00 were made for one burning outfit which retails for from $69.45 to $8[illegible].45.

g) That the defendant made a practice of charging as a cost of said construction an arbitrary amount or percentage for the workmen's compensation and liability insurance premiums, which amount, the defendant refuses to itemize or substantiate to plaintiff or his accountants; and defendant refuses to reveal or exhibit the policies and other records which would show the actual costs of such workmen's compensation and liability insurance premiums.

h) That the defendant charged to the costs of said job certain items which were properly includable in the overhead charge for which the defendant was allowed a general charge of two (2%) per cent as provided in the said contract.

i) That the defendant charged as costs of this job certain amounts for alleged payments by the defendant which were not proper costs of the job.

Fourteenth. Upon information and belief, that the defendant in breach and violation of the terms of the aforesaid contract between the plaintiff and defendant, and for the purpose of depriving the plaintiff of his rightful share of the profits of said construction as provided in the said contract, did inflate the amount of said costs by substantial sums in excess of their true amount and did conceal, and divert from the income and profits of the said job, sums in which plaintiff is entitled to participate under the terms of said contract and that both the purported statements sent to plaintiff by defendant, as alleged in paragraph "eleventh" herein, reflected and were based upon the overstatement of costs and concealment of profits shown in paragraph "thir- [fol. 16] teenth" hereof.

Fifteenth. That defendant has further breached and violated the terms and conditions of the aforesaid contract by failing and refusing to fully account to the plaintiff for his share of the said profits and by refusing to permit plaintiff to make a full and complete audit and inspection of defendant's books and records relating to the same.

Sixteenth. That although duly demanded by plaintiff of the defendant, defendant has refused to give plaintiff a due and full account of such joint venture and enterprise and of the profits to which the plaintiff is entitled under the aforesaid provision of said contract and defendant still refuses to give the same, and that plaintiff can not determine the amount due him in connection with the said joint venture and enterprise and profits without such accounting by the defendant.

Seventeenth. That plaintiff has no adequate remedy at law.

Wherefore, plaintiff demands judgment against the defendant:

1. That the rights of the plaintiff in the said joint venture and enterprise and the profits thereof be established;

2. That the defendant be compelled to account to plaintiff for such joint venture and enterprise and the profits thereof;

3. That judgment be awarded in favor of the plaintiff and against the defendant for the amount due the plaintiff in connection with such joint venture and enterprise and for his share of the profits thereof;

[fol. 17] 4. That the plaintiff have such other and further relief as may be just and proper, together with costs and disbursements.

Bernard I. Scherer, Attorney for Plaintiff, Office & P. O. Address, 320 Broadway, Borough of Manhattan, City of New York.

Verified 4/25/53 by pl.

[fol. 18] EXHIBIT "1" TO EXHIBIT "C"

6-MR-1/24/50

This Agreement, made this 2nd day of March, 1950, between Victor Frenkil, of the City of Baltimore, State of Maryland, hereinafter sometimes referred to as "Frenkil", Baltimore Contractors, Inc., a Maryland corporation hereinafter sometimes referred to as "Parkway Realty", Maryland Apartments, Inc., a Maryland corporation hereinafter

sometimes referred to as "Maryland Apartments", and Jacob H. Bodinger, of the City of New York, State of New York, hereinafter sometimes referred to as "Bodinger".

Preliminary Statement

1. Baltimore Contractors, the controlling part of whose outstanding shares of stock is owned by Frenkil, has purchased and transferred to Parkway Realty, Inc., a Maryland corporation recently organized by Frenkil, the lot of ground bounded by University Parkway, St. Paul Street, 34th Street and Calvert Street, in the City of Baltimore, State of Maryland.

2. Parkway Realty will grant and assign to Maryland Apartments, under a Federal Housing Administration approved ninety-nine year ground rent lease the portion of the aforedescribed property which is more particularly described in Exhibit A attached hereto, upon which said portion of land is to be constructed what is known as an FHA elevator type apartment building or buildings, the mortgage financing of which is to be arranged in accordance with Section 608 of the National Housing Act, as amended, and said activities shall hereinafter be called the "project".

3. The remaining portion of the said plot retained by Parkway Realty is to be used or disposed of as the said [fol. 19] corporation hereafter may determine.

4. Bodinger, under Frenkil's direction, is to assist, operate and supervise the development and consummation of the said FHA project, and to act in furthering the interests of Parkway Realty, Maryland Apartments and Baltimore Contractors.

5. If any further financing, advances or loans may be required by Parkway Realty or Maryland Apartments, it is understood that Frenkil and/or Baltimore Contractors may, but are not obligated to, provide the same.

6. The purpose of this agreement is to record and bind the agreements heretofore reached between the parties hereto.

Agreement

Now, therefore, in consideration of the foregoing and One Dollar ($1.00) and other good and valuable considera-

tions and the mutual undertaking of the parties, it is agreed as follows:

First. In consideration of the conveyance by Baltimore Contractors to Parkway Realty of the lot of ground referred to in Paragraph "1" of the "Preliminary Statement", Parkway Realty shall be indebted to Baltimore Contractors in the sum of One Hundred Fifty-two Thousand Five Hundred Dollars ($152,000.00) (that being the price paid by Baltimore Contractors for the said property), plus all expenses incurred by Baltimore Contractors in acquiring said property and conveying the same to Parkway Realty; and Parkway Realty shall also be indebted to Baltimore Contractors for such additional disbursements as Baltimore Contractors has made on its behalf. The aforesaid ninety-nine year lease, as and when it is created, shall be transferred and conveyed to Baltimore Contractors as security for the payment of the aforesaid purchase price of One hundred fifty-two thousand Five hundred Dollars ($152,-500), it being understood, however, that the said purchase [fol. 20] price shall become due and payable only as provided in subdivision (b) of Paragraph First hereof. Parkway Realty shall issue all of its authorized capital stock which shall be of no par value for the following cash consideration: 75% of said shares of stock to Baltimore Contractors and/or Victor Frenkil and/or their respective designees in such proportions as they may designate upon payment of the sum of $30.00 as the purchase price for said 75% of said shares of capital stock; and the remaining 25% of said shares of capital stock to Bodinger or his designees upon the payment of the sum of $10.00 as the purchase price therefor. The holder or holders of the 25% of the capital stock of Parkway Realty to be issued under this Paragraph to Bodinger or his designees shall have the right to purchase 25% of any additional capital stock of Parkway Realty, the issuance of which may be from time to time authorized, upon the same terms and conditions as the other 75% of such additional stock is issued.

(a) Parkway Realty shall pay interest at four per cent (4%) per annum to Baltimore Contractors on the aforesaid purchase price and other indebtedness already owing by it to

Baltimore Contractors, and on any further loans, advances or financing which Frenkil and/or Baltimore Contractors may provide (all of which purchase price and other indebtednesses shall hereinafter be referred to as the "indebtedness"), and said interest shall accrue from the respective dates on which the indebtedness is incurred.

(b) Parkway Realty shall repay to Baltimore Contractors and/or Frenkil the indebtedness, as soon as, and to the extent that, Parkway Realty shall have funds available to repay the same; provided, however, that if ninety days have elapsed after the receipt of the last and final payment under the National Housing Act insured mortgage which is to be placed on the project, and the indebtedness has not [fol. 21] been paid in full with interest, and it then becomes necessary to use all or a part of Bodinger's share of the net profits, if any, for the purchase of a portion of said indebtedness in the manner prescribed by Paragraph Third hereof, then the balance of the indebtedness with interest shall immediately become due and payable to the holders thereof; provided, further, that if Bodinger or his designees thereupon or prior thereto shall, have purchased an amount equal to 25% of the unpaid indebtedness either by the use of his share of the profits in accordance with Paragraph Third or by other funds, then the entire balance of the indebtedness shall not become due unless and until Bodinger shall consent thereto in writing. However, Parkway Realty shall nevertheless continue to repay the balance of the indebtedness with interest as soon as and to the extent that Parkway Realty shall have funds available to make payments thereon, all payments to be in a pro rata basis, viz: 25% of such payments to Bodinger or his designees and 75% to Baltimore Contractors and/or Frenkil or their respective designees as the holders of the other 75% of said indebtedness. Bodinger or his designees shall have an absolute right to purchase such 25% of the balance of the indebtedness at the face value thereof plus accrued interest, and on exercising that right he and his designees shall be entitled to the benefit of their proportionate share of any security that has been given for such indebtedness.

Second. Maryland Apartments shall issue all of its authorized capital stock which shall be of no par value (except

those preferred shares required by the Rules and Regulations of the Federal Housing Administration to be issued to the Federal Housing Administrator) for the following cash consideration: 75% of said shares of capital stock to Baltimore Contractors and/or Victor Frenkil and/or their respective designees in such proportions as they may desig- [fol. 22] nate upon payment of the sum of $30.00 as the purchase price for said 75% of said shares of capital stock; and the remaining 25% of said shares of capital stock to Bodinger and/or his respective designees upon payment of the sum of $10.00 as the purchase price therefor. The holder or holders of the 25% of the capital stock of Maryland Apartments to be issued under this Paragraph to Bodinger or his designees shall have the right to purchase 25% of any additional capital stock of Maryland Apartments, the issuance of which may be from time to time authorized, upon the same terms and conditions as the other 75% of such additional stock is issued.

(a) All indebtedness which shall become owing by Maryland Apartments to Frenkil and/or Baltimore Contractors for financing loans or advances provided or made by them (hereinafter referred to as the "indebtedness") shall bear interest at four percent (4%) per annum accruing from the dates on which the indebtedness is incurred, and the indebtedness shall be repaid by Maryland Apartments as soon as, and to the extent that, it shall have funds with which to pay the same; provided however, that if ninety days have elapsed after the receipt of the last and final payment under the National Housing Act insured mortgage which is to be placed on the project, and the indebtedness has not been paid in full with interest, and it then becomes necessary to use all or a part of Bodinger's share of the net profits, if any, for the purchase of a portion of said indebtedness in the manner prescribed by Paragraph "Third" hereof, then the balance of the indebtedness with interest shall immediately become due and payable to the holders thereof; provided further, that if Bodinger or his designees thereupon or prior thereto shall have purchased an amount equal to 25% of such unpaid indebtedness, either by the use of his share of the profits in accordance with Paragraph Third or [fol. 23] by other funds, then the entire balance of the in-

debtedness shall not become due unless and until Bodinger shall consent thereto in writing. However, Maryland Apartments shall nevertheless continue to repay the balance of the indebtedness with interest as soon as and to the extent that Maryland Apartments shall have funds available to make payments thereon, all payments to be on a pro rata basis, viz: 25% of such payments to Bodinger or his designees and 75% to Baltimore Contractors and/or Frenkil or their respective designees as the holders of the other 75% of said indebtedness. Bodinger or his designees shall have an absolute right to purchase such 25% of balance of the indebtedness at the face value thereof plus accrued interest, and on exercising that right he and his designees shall be entitled to the benefit of their proportionate share of any security that has been given for such indebtedness.

Third. In the event Baltimore Contractors or any other corporation or corporations owned or controlled by Baltimore Contractors and/or by Frenkil shall obtain or receive any contracts in connection with the construction of the aforementioned property, Baltimore Contractors agrees to pay Bodinger twenty-five percent (25%) of the net profits received under said contracts. Any and all fees which such corporation or corporations shall receive in connection with the aforesaid construction shall be included as part of the receipts in calculating said profits which shall be calculated in accordance with the usual accounting practice of Baltimore Contractors. It is also understood and agreed that in calculating said net profits two percent (2%) of all receipts is hereby agreed to be deducted as the overhead expense of Baltimore Contractors in performing the work and said percentage shall include and cover all items and costs ordinarily included in overhead in accordance with the usual accounting practice of Baltimore Contractors. In the event [fol. 24] of any dispute in the calculation of the net profits under this Paragraph, Frenkil shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute. It is understood and agreed that Bodinger's said 25% of such net profits, if any, and only to the extent necessary, shall be used to purchase from Baltimore Con-

tractors and/or Frenkil or the holder of such indebtedness 25% of the balance of the indebtedness and interest at face value owing by either or both Parkway Realty or Maryland Apartments at the time such net profits are determined, and any excess of the net profits not required to purchase the said 25% of the balance of the indebtedness and interest thereon shall be paid over to Bodinger or his designee.

Fourth. Bodinger shall give such part of his time as may be necessary to the successful prosecution of the project and shall serve in furtherance of the interests of Parkway Realty, Maryland Apartments, Baltimore Contractors and any other corporation or corporations formed in connection with additional construction on or development of the remaining portion of the aforementioned property, his duties to include executive direction of architecture, engineering, construction and all other incidental services necessary to the successful completion of the project, and as a salary while he is so engaged, he shall receive from the corporation or corporations to which or for which his said services are rendered, Fifteen thousand Dollars ($15,000.00) per annum, payable monthly, commencing retroactively from May 15, 1949, when he entered upon such services. Bodinger's said services may be terminated on May 15, 1950 in which event his salary shall cease, provided, however, that in the event of such termination of his services, Bodinger's rights under this agreement, except as to such $15,000 annual salary, shall not be affected by such termination of services but shall continue in full force and effect. [fol. 25] If such one year salary shall not be paid to Bodinger, as and when it becomes due, then Frenkil and/or Baltimore Contractors agree to lend to the corporation or corporations which are to pay such salary, the amount needed to pay the same.

Fifth. Frenkil shall receive for his services in connection with construction on and development of the property referred to in this agreement Fifteen thousand ($15,000) on or before May 15, 1954, in such instalments as may be determined, from the corporation or corporations in behalf of which such services shall have been rendered.

Sixth. Except as hereinabove expressly provided with respect to the salaries of Bodinger and Frenkil, no salaries

shall be paid by either Parkway Realty or Maryland Apartmentss to any of their officers, unless Bodinger shall consent thereto in writing. Nor shall compensation be paid to any employee of said corporations except reasonable compensation for services actually rendered and reasonably necessary in prosecuting the affairs of such corporation.

Seventh. In the event one or more other corporations are formed or caused to be formed by any of the parties hereto, for the purpose of additional construction upon or development of the remaining portion of the aforementioned property, Bodinger or his designees and Frenkil or his designees are to receive the same rights respectively in such corporation or corporations as are given to them by the provisions of this agreement with respect to Maryland Apartments.

Eighth. In the event changes in the corporate structure of either Parkway Realty or Maryland Apartments are required in furtherance of the project under the National Housing Act or are desirable taxwise, it is understood and agreed between the parties hereto that such changes may [fol. 26] be made provided the intent and purpose of this agreement are not invalidated.

Ninth. Baltimore Contractors and/or Frenkil agree that the stock respectively issued to them or either of them in Maryland Apartments and Parkway Realty shall be so voted as to elect Bodinger a director of each such corporation as long as he or his designees owns a 25% capital stock interest in both said corporations.

Tenth. The parties hereto shall take such action as may be necessary to carry out or perform any of the matters or things required or intended by the provisions of this agreement.

Eleventh. The certificates of stock of Parkway Realty and Maryland Apartments shall have inscribed thereon the following:

> "This certificate and the shares herein referred to are subject to the provisions of an agreement dated January, 1950, made between Victor Frenkil, Baltimore Contractors, Inc., Parkway Realty, Inc., Maryland Apartments, Inc., and Jacob H. Bodinger, a copy of which is on deposit with the respective secretaries of Maryland Apartments and Parkway Realty and may be

inspected upon request by the respective stockholders of said corporations."

Twelfth. This agreement shall inure to the benefit of and be binding upon the designees, heirs, successors, personal representatives, transferees and assigns of the respective parties hereto.

In witness whereof, the parties hereto have executed this agreement the day and year first above written.

Victor Frenkil. (Seal.)

Attest as to Victor Frenkil: Virginia Lambrow (Sgd.)
Baltimore Contractors, Inc., by J. P. Frenkil, Vice-President.

Attest: A. H. Graham, Secretary.
Parkway Realty, Inc., by Dulany Foster, President.

Attest: A. H. Graham, Secretary.
[fol. 27] Maryland Apartments, Inc., by Dulany Foster, Vice President.

Attest: A. H. Graham, Secretary.

Jacob H. Bodinger.

Attest as to Jacob H. Bodinger, Wm. D. Potts.

[fol. 28] EXHIBIT "D" TO AFFIDAVIT

Civil #13508

Oct. 27, 1953

Memorandum

"Defendant moves for a stay of this action pursuant to the statute (9 U. S. C. A. 3), authorizing such stay 'upon any issue referable to arbitration under an agreement in writing for such arbitration.

Plaintiff by his complaint seeks an accounting and other relief in connection with an agreement entered into between the parties. The issue before this Court is the construction of paragraph "third" of the agreement, par-

ticularly whether it was the intention of the parties that disputes arising thereupon be determined by arbitration. The paragraph in part, reads:

> 'In the event of any dispute in the calculation of the net profits under this paragraph, Frenkil (referring to the defendant's president) shall select either Wooden or Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute.'

The Court commends counsel for their able presentation of the matter and after careful examination and consideration of the papers and briefs submitted by them, concludes that it was not the intention of the parties that paragraph "third" of the agreement should constitute an agreement to arbitrate and accordingly denies the motion.

Walter Bruchhausen, U. S. D. J."

[fol. 29] In the United States Court of Appeals for the Second Circuit

Endorsement Granting Motion to Dismiss—December 11, 1953

Motion granted. See Morgantown vs. Royal Ins. Co., 337 U. S. 254. H. B. C., A. N. H., H. R. M., U. S. C. JJ

[fol. 30] United States Court of Appeals for the Second Circuit

[Title omitted]

Proposed Order Granting Stay

Appellant having applied to this court for an order staying the operation of the order of this court granting appellee's motion to dismiss the appeal taken herein from an order of the United States District Court, for the Eastern

District of New York, denying appellant's motion for a stay of this action pending arbitration under the Federal Arbitration Act, and said application having duly come on before the Hon. —— ——, one of the Judges of this Court, and after hearing George Brussel, Jr., of counsel, in support of said application and upon reading the affidavit of George Brussel, Jr., in support thereof, it is

Ordered, that all the proceedings by plaintiff-appellee under the order of this Court dated December 11, 1953 dismissing the appeal herein, be and they hereby are stayed pending final determination of an application by appellant to the Supreme Court for a writ of certiorari directed to this court in respect of such order of dismissal, provided that appellant shall file its application for such writ within — days after the date of this order.

Dated New York, N. Y., December —, 1953.

—— ——, Circuit Judge.

[fol. 31] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AFFIDAVIT OF GEORGE BRUSSEL, JR., IN SUPPORT OF STAY

STATE OF NEW YORK
County of New York, ss.:

George Brussel, Jr., being duly sworn, deposes and says:

1. I am a member of the firm of Rosston, Hort & Brussel, attorneys for Defendant-Appellant herein. This is an application by Defendant-Appellant for an order staying an order of this Court dismissing an appeal to this court by Defendant-Appellant herein, pending application to the Supreme Court for a writ of certiorari in respect of such dismissal.

2. Deponent makes this affidavit because the question involved is merely procedural and because deponent's client is a resident of Maryland and its officers are not available to execute an affidavit.

3. The order which defendant-appellant will seek to have reviewed, by the Supreme Court, was made by this Court

on December 11, 1953. It granted appellee's motion to dismiss appellant's appeal from an order of the District Court denying appellant's motion for a stay of this action pending arbitration under the Federal Arbitration Act.

[fol. 32] 4. This is an action for an accounting instituted in the United States District Court for the Eastern District of New York. The action is founded on a contract between the parties containing a clause which, in the opinion of counsel for the appellant, is the equivalent of an agreement to arbitrate the particular grievances asserted in the complaint. The case is not at issue, the motion for a stay having been made before answer.

5. Appellant moved in the District Court for a stay of further proceedings herein pending arbitration under the Federal Arbitration Act. The motion was denied by Judge Walter Bruchhausen who subsequently made an order staying the appellee from further proceedings herein pending an appeal to this Court theretofore taken by the appellant from such order.

6. Appellee then moved in this Court to dismiss the appeal contending that the order denying the stay is not appealable. This Court, on December 11, 1953, made an order granting the motion to dismiss, its decision consisting of the following:

> "Motion (to dismiss appeal) granted. See Morgantown vs. Royal Insurance Co., 337 U. S. 254".

7. Appellant intends to apply to the Supreme Court for a writ of certiorari directed to this Court to review said order. In this application appellant will contend, among other things, that the Morgantown case is actually authority for a denial of the motion to dismiss the appeal; that in the case at bar the denial by the District Court of the motion for a stay pending arbitration, is equivalent to a stay of the arbitration, and that such a stay constitutes an intervention by a court of equity against a wholly independent [fol. 33] proceeding at law, namely, the quasi-judicial proceeding represented by a Federal statutory arbitration.

8. In the Morgantown case, appellant appealed from the dismissal by the Fourth Circuit Court of Appeals of an appeal from an order directing a prior trial of an equitable

defense in an action at law otherwise triable by a jury. The Circuit Court dismissed the appeal upon the ground that the order was not appealable and the Supreme Court affirmed, pointing out that, in that case, the denial of a prior jury trial was not equivalent to the enjoining of a pending action at law by a court of equity. The affirming judges left untouched earlier decisions of the Supreme Court (*Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, and *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188) which involved actions on insurance policies ordinarily triable by jury. The defendants in both of those cases procured an order staying the proceedings at law pending the trial of later-begun equitable proceedings based upon defenses of fraud against the contract sued upon. The Supreme Court, in both cases, held that these orders were the equivalent of orders granting an injunction and were appealable as of right.

9. Appellant submits that, in the case at bar, we have precisely the same situation for, in this case, the arbitral proceedings (which were actually commenced by appellant's notice and demand to proceed with arbitration), are, for the purposes of this question, the equivalent of judicial proceedings at law, and the effect of a denial of a stay of this action pending the completion of such proceeding is the equivalent of an injunction against them. This point, while referred to obliquely in a question put to counsel by Judge [fol. 34] Medina on the argument, was not passed upon or decided by this Court, and, so far as counsel are able to determine, has never been decided by any other Court of Appeals or by the Supreme Court.

10. Upon the application for certiorari it will also be urged that the Supreme Court has never reviewed the precise question passed upon in this case, namely, whether an order of a court in a suit for an accounting, denying a motion for stay pending arbitration, is or is not appealable as a matter of law. All other Supreme Court cases dealing with the problem have involved either admiralty actions or cases in which the stay was granted. Upon the application for the writ it will be urged, that, in the former class of cases the Supreme Court decisions turned on the Admiralty Court's lack of equity powers and that, in the

latter class of cases, the granting of the stay failed to present the irreparable injury inherent in the case at bar where appellant, at great cost and expense, will be compelled to litigate 200 miles from its place of business instead of proceeding in arbitration in the city in which it maintains its principal office.

11. It will also be urged that, in the light of these considerations, the effect of this Court's decision will be to frustrate the policy of the Federal Arbitration Act and to deny to appellant a substantial right granted to it by statute to its great and irreparable damage.

12. I have advised appellant that the contemplated application to the Supreme Court has substantial merit, and appellant is prepared to prosecute it, in good faith, with diligence and dispatch.

[fol. 35] 13. Unless this court grants a stay appellant will be in default in answering the complaint. Its time to answer has not been extended by order or stipulation.

14. Appellant's solvency is not questioned. In granting appellant's motion for a stay in the District Court pending appeal to this Court, the District Court so found.

15. Appellant has made no previous application to this Court or any other court for this relief.

Wherefore, appellant prays for an order staying all proceedings by plaintiff-appellee under the order of this Court dismissing this appeal, pending final determination of appellant's application to the Supreme Court for a writ of certiorari, and for such other relief as may be just.

Sworn to before me, this 15th day of December, 1953.

George Brussel, Jr.

[fol. 36] In United States Court of Appeals

Endorsement Denying Stay—December 16, 1953

Motion denied.

H. B. C., A. N. H., H. R. M., U. S. C., JJ.

Dec. 16, 1953.

[fol. 37] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF BERNARD I. SCHERER IN OPPOSITION TO STAY

STATE OF NEW YORK,
County of Kings, ss:

Bernard I. Scherer, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff-appellee herein, and make this affidavit in opposition to defendant-appellant's application for a stay of the order of this Court dismissing the appeal herein, pending application to the Supreme Court for a writ of certiorari.

2. The papers on this application were handed to me yesterday afternoon at 3:40 P. M. as we were about to enter the court room of this Court to oppose this application, of which we had previously received telephone notification. Since we understand these papers will be submitted to the Judges who decided the motion to dismiss the appeal before 11:00 A. M. today, this affidavit necessarily will be most brief.

3. It is difficult to understand from a reading of the supporting affidavit of defendant-appellant's attorney, just what its contention is. However, it can be gathered that defendant-appellant's argument completely ignores what the Supreme Court actually did hold in the following cases:

Enelow v. N. Y. Life Ins. Co., 293 U. S. 379;
[fol. 38] Shanferoke C. & S. Corp. v. Westchester S. Corp., 293 U. S. 449;
Schoenamsgruber v. Hamburg American Line, 294 U. S. 454;
Ettelson v. Metropolitan Life Ins. Co., 317 U. S. 188;
Morgantown v. Royal Ins. Co., 337 U. S. 254.

All these cases made it plain that a stay is appealable as the equivalent of an injunction only when it constitutes the intervention by a Court of equity in an action at law. The stay sought in this case cannot by any process of distorted reasoning be fitted into the requirements of the said Rule.

The Morgantown case made it plain that the aforesaid requirements cannot be deviated from one iota; and certainly the Shanferoke and the Schoenamsgruber decisions made it clear that an application for a stay pursuant to the Arbitration Act was not *per se* appealable as an injunction, but required the precise setting of the Enelow case (viz. an application based on an equitable defense to stay an action at law), to constitute the stay as the equivalent of an interlocutory injunction.

4. We feel that any further discussion of the proposed application by defendant-appellant for a writ of certiorari should not be required in view of the full consideration given by this Court to this very point in the motion to dismiss the appeal decided by this Court last Friday (December 11th, 1953).

5. The application for a stay is further opposed on the grounds that it is merely the latest of a series of steps taken by the defendant-appellant to delay the prosecution of this action. This talent of defendant for delay finds its highest testimonial in the fact, that although almost eight months have elapsed since this action was commenced, defendant has succeeded up to this very moment in avoiding serving [fol. 39] an answer—thereby preventing plaintiff from even noticing this case for trial and progressing on an equity calendar that is more than one year behind in the United States District Court for the Eastern District of New York.

6. Most aggravating about this withholding by defendant of an answer is the fact that it served no good purpose. The interposition of an answer by defendant would not have affected in any respect any of the rights claimed by the defendant in this action—whether to arbitration or otherwise. The only purpose accomplished by the withholding of an answer is the delay of the action—and in that defendant has been most successful.

7. This application is further opposed on the ground that defendant has shown no need for any stay. It can have its proposed application for a writ of certiorari disposed of long before this case can be reached for trial. Defendant has not shown any prejudice which would result from a denial of the stay; and certainly there can be none which would be disproportionate to the prejudice plaintiff would

suffer by the further delay of this action if a stay were granted.

8. Defendant's appeal was dismissed upon the grounds that it was premature—that the appeal could be had only from a final judgment herein. On that ground defendant should seek to hasten the final judgment in this action, so that it can have its appeal—instead of compounding the delays in this case by stay upon stay.

Wherefore, it is prayed that the stay sought by defendant-appellant be denied on the following grounds:

1. That the proposed application for certiorari is completely without merit.

2. That the stay is sought merely for the purposes of delay.

[fols. 40-41] 3. That the defendant has shown no need for a stay which, if granted, would prejudice plaintiff.

Sworn to before me this 16th day of December, 1953.

Bernard I. Scherer.

[fols. 42-43] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION FOR STAY—December 16, 1953

A motion having been made herein by counsel for appellant for a stay pending an application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 44] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 626

BALTIMORE CONTRACTORS, INC., Petitioner,

vs.

JACOB H. BODINGER

ORDER ALLOWING CERTIORARI—Filed April 12, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

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MAR 8 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted] 31

BALTIMORE CONTRACTORS, INC.,
Petitioner,

vs.

JACOB H. BODINGER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

MORRIS ROSENBERG,
Baltimore, Maryland,

GEORGE BRUSSEL, JR.,
New York City,
Attorneys for Petitioner.

The Daily Record Co., Baltimore 3, Md.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. ------

BALTIMORE CONTRACTORS, INC.,
Petitioner,

vs.

JACOB H. BODINGER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case.

Opinions Below

The opinion of the District Court (R. 21-22) is not reported. There was no opinion by the United States Court of Appeals for the Second Circuit which by an order dismissed petitioner's appeal (R. 22).

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22) and the jurisdiction of this Court is invoked under 28 USCA 1254 (1).

Question Presented

In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, which was an *action at law*, this Court held that an interlocutory order denying a stay under Section 3 of the United States Arbitration Act (9 USCA 3) should be regarded as a denial of an injunction from which an appeal lies. The question presented here is:

Whether in an action for an *accounting* an interlocutory order denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an injunction from which an appeal lies.

Statement of the Case

This action for an accounting and for a judgment for a share of net profits under an agreement was commenced by Jacob H. Bodinger, respondent, in the Supreme Court of the State of New York, County of New York in April 1953 and was removed by petitioner to the United States District Court for the Eastern District of New York on grounds of diversity of citizenship (R. 3, 6-7, 13, 18).

Paragraph "Third" of the written agreement sued on in part provides (R. 18, 8, 22):

> "In the event of any dispute in the calculation of the net profits under this paragraph Frenkil (referring to petitioner's president) shall select either Wooden and Benson or Haskins and Sells or an accountant or aud-

itor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute."

Petitioner moved for a stay of the action (R. 3, 21) pursuant to the provisions of section 3 of the United States Arbitration Act (9 USCA) authorizing such a stay "upon any issue referable to arbitration under an agreement in writing for such arbitration."

On November 4, 1953 the District Court passed an order denying petitioner's application for a stay pending arbitration (R. 5-6) from which order petitioner took an appeal to the United States Court of Appeals for the Second Circuit (R. 4) on November 9, 1953.

On December 7, 1953, respondent moved the Court of Appeals for an order dismissing the appeal on the ground that the order appealed from was not an appealable order (R. 1, 2). On December 11, 1953 the Court of Appeals granted respondent's motion to dismiss the appeal by entering an order reading "Motion granted. See *Morgantown v. Royal Ins. Co.*, 337 U. S. 254" (R. 22).

By an order of this Court entered on December 29, 1953, all proceedings before the District Court were stayed pending timely filing and disposition of this petition for certiorari.

Reasons for Granting the Writ

1. The question has not been decided by this Court.

2. The United States Courts of Appeals to which the question has been put are not in agreement. The decision of the Second Circuit in this case holding that such an order is not appealable is in direct conflict with the decision of

the Ninth Circuit in *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, holding that such an order is an appealable order.

3. The decision of the Second Circuit is contrary to the intent of Congress in that it precludes appellate review of an Arbitration Act order which the Congress regarded as an injunction.

4. This case involves an important question of federal law which should be settled by this Court.

5. It should be reviewed also because it has been incorrectly decided by the Court below for the reasons given in support of this petition.

WHEREFORE, for the foregoing reasons and for the reasons and authorities in the brief annexed hereto, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

MORRIS ROSENBERG,

GEORGE BRUSSEL, JR.,

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

There was no opinion by the United States Court of Appeals for the Second Circuit and the memorandum opinion of the United States District Court for the Eastern District of New York appears in the record (R. 21-22).

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22) and the jurisdiction of this Court is involved under 28 USCA 1254(1).

Question Presented

Whether an order, entered in an action for an accounting, denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an interlocutory injunction from which an appeal lies?

Statutes Involved

9 USCA 3 (U. S. Arbitration Act):

> *"Stay of proceedings where issue therein referable to arbitration*
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Title 28 USCA section 1292 (1):

'Interlocutory decisions

"The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, * * *;".

Statement of the Case

This action for an accounting, based on a written agreement between the parties, was commenced by respondent in the Supreme Court of the State of New York, County of New York and was removed by petitioner to the United States District Court for the Eastern District of New York on the ground of diversity of citizenship (R. 3). Petitioner applied for a stay of proceedings under Section 3 of the United States Arbitration Act on the ground that the matters in dispute were subject to arbitration under the written agreement (R. 3). The District Court passed an order denying petitioner's application for a stay (R. 5-6) from which petitioner appealed to the United States Court of Appeals (R. 4) which dismissed the appeal on the ground that no appeal lies from the District Court's order denying the stay under Section 3 of the Federal Arbitration Act (R. 2, 22). A lengthier statement of the facts, which are not in dispute, appears in the petition for certiorari at pages 2-3.

Specifications of Error

Although the Court of Appeals rendered no opinion, the petitioner contends that the following points have been erroneously decided:

(1) That under 28 USCA 1292 (1) an appeal does not lie from the order of the District Court in this case denying petitioner's application for a stay made under the provisions of Section 3 of the United States Arbitration Act (9 USCA 3).

(2) That under 28 USCA 1292 (1) such an order, though appealable when entered in an action at law, is not appealable when entered in an action for an accounting.

(3) That under 28 USCA 1292 (1) the denial of a stay under Section 3 of the United States Arbitration Act in an action for an accounting is not regarded as an interlocutory injunction for purposes of appeal.

Summary of Argument

Ever since 1935, when this court decided *Shanferoke C. & S. Corp. v. Westchester S. Corp.*, 293 U. S. 449, an order granting or refusing a stay under Section 3 of the United States Arbitration Act has been regarded as an interlocutory injunction for purposes of appeal; i.e., as an appealable order under the provisions of the Judicial Code now consolidated in 28 USCA 1292 (1). This was so whether the action sought to be stayed was brought on the law side or the equity side of the district court. See in *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, where the action was on the "equity side" and *Markel Elec. Products v. United Elec. R. M. W. of Am.* (CA 2) 202 F. 2d 435, where the action was on the "law side." The Court of Appeals for the Second Circuit, however, in the instant case has ruled that an Arbitration Act order is not appealable when the action is brought on the equity side.

Respondent in his argument below conceded that in an action at law an Arbitration Act order is appealable but

sought to draw a distinction between an action at law and one in equity, relying on the fictional injunction theory applied in *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, and in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188.

The fiction of *Enelow* and *Ettelson* seem to have been done with by the majority of this Court in *Morgantown v. Royal Ins. Co.*, 337 U. S. 254, (see *Moore's Commentary on The U. S. Judicial Code* (1949 ed.) par. 0.03 (52) pp. 492-494). But whether or not that fiction still prevails, petitioner contends that an Arbitration Act stay order is not a stay granted under an equity court's inherent power to maintain orderly processes of justice in causes before it but is an interlocutory injunction for purposes of appeal because the granting or refusing of a stay can cause irreparable injury to the aggrieved party which cannot be undone by an appeal from the final order or decree in the case and because the Congress intended that such an order should be an interlocutory injunction for purposes of appeal.

ARGUMENT

An Order Denying a Stay Under Section 3 of the United States Arbitration Act Should be Regarded as an Interlocutory Injunction Appealable Under 28 USCA 1292(1).

A brief resumé of the history of 28 USCA 1292 (1), under which interlocutory injunctions are appealable is significant. When the circuit courts of appeals were established by the Act of 1891, section 7, provision was made for an appeal from an "interlocutory order or decree granting or continuing" such an injunction (26 Stat. 828). The section was amended by the Act of February 18, 1895, c. 96, 27 Stat. 666 to give an appeal where an interlocutory injunction was *refused* or *dissolved*. Although this additional

provision for appeal was repealed by the Act of June 6, 1900, 21 Stat. 1899, 1900 (*March v. Romare* (CA 5) 116 F. 354), it was restored in the broadest terms by section 129 of the Judicial Code, 28 USCA 227 (1940) and is substantially carried forward as 28 USCA 1292(1). See *Moore's Commentary on the U. S. Judicial Code* (1949 ed.) page 42, note 15 in subhead (5).

The first case in which this Court passed on the appealability of an order denying a stay under Section 3 of the United States Arbitration Act was *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, an action at law for damage for breach of a contract. Mr. Justice Brandeis, speaking for the Court there said (p. 451): "Being an interlocutory order, it was appealable to the Circuit Court of Appeals under § 129, only *if the denial of the stay should be deemed the denial of an injunction*" (italics supplied). The denial of the stay was held to be the denial of an injunction. Applying the theory of *Enelow v. New York L. Ins. Co.*, 293 U. S. 379, the opinion stated that: "an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274 b. U. S. C. title 28, § 398, is appealable under § 129; * * * and that the motion for a stay is an application for an interlocutory injunction based on the special defense" (293 U. S. 452).

What is known as an "equitable defense" stemmed from the old English chancery practice under which the law-defendant with the basis went into equity as a plaintiff and obtained an injunction against the law-plaintiff from further prosecuting his law action. If the law action was stayed pending final determination of the equity action, the law-defendant was granted an interlocutory injunction which in *fact* was issued by the chancellor.

But in federal practice, separate law and equity courts have never existed although there was a law and an equity side which was not completely changed by The Law & Equity Act of 1915 (28 USCA 397, 398) (see 2 Moore's Federal Practice, (1948 ed.) par. 2.05 [2]), p. 336 etc.).

In the *Enelow* case, an equitable defense was interposed on the law side of the court and the equitable issues were set down for trial prior to the legal issues on the theory that an interlocutory injunction had been granted against the action at law although in *fact* none had been issued.

Later, even after the Federal Rules had united law and equity, thereby abolishing the law and equity side, the fictional injunction of the *Enelow* case was again used in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, in a similar situation and the interlocutory order was held to be an interlocutory injunction, and therefore appealable.

Then came *Morgantown v. Royal Ins. Co.*, 337 U. S. 254, where the theory of the *Enelow* case and the fictional injunction could have been but was not applied by the majority of this Court. This was an action for reformation of an insurance policy on the basis of mutual mistake; the defendant denied mistake and filed a counterclaim to recover on the policy as written. After issue was joined on the counterclaim, the defendant filed a demand for a jury trial under Rule 38 (b) and the district court granted the plaintiff's motion to strike the demand and set the case for trial by the court without a jury. On appeal, the court of appeals refused to treat the interlocutory order as an order granting or denying an injunction and dismissed the appeal. This Court affirmed. It could have, according to Professor Moore,* "applied historical analogies and

* *Moore's Commentary on The U. S. Judicial Code*, pp. 493-494.

reached the same result: that an order denying the defendant a jury trial on his counterclaim at 'law' interposed in plaintiff's suit in 'equity' in advance of the plaintiff's equitable issues was not an injunction by a chancellor, but a mere stay of the legal proceedings by a common law judge. [This is the position taken by Justice Frankfurter in his concurring opinion.] Mr. Justice Murphy speaking for the majority of the Court did not choose to do so. While he did not expressly overrule *Enelow* and *Ettelson* his theory and language impliedly do. 'This is not a situation, he stated, where a "chancellor" in denying a demand for jury trial can be said to be enjoining a "judge" who has cognizance of a pending action at law. This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed. The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from common-law practice which supported our conclusions in the *Enelow* and *Ettelson* cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one.' [Justices Black and Rutledge dissenting regard the case as overruling *Ettelson v. Metropolitan Ins. Co.*]".

But whether or not the theory of the *Enelow* case has been overruled by implication, it is submitted that the true test of appealability of the order is not whether the action was commenced "at law" rather than "in equity", as respondent contends, but whether the order in substance

invokes the normal equitable principles underlying the injunctive process. If it is the latter, it should be regarded as an injunction.

It should first be observed that an Arbitration Act order granting or refusing a stay is not a stay "granted by virtue of the (equity) court's inherent power to control the progress of the cause pending before it so as to maintain the orderly processes of justice" [*U. S. v. Horns* (CA 3) 147 F. 2d 57, 60]. It is a *statutory* stay granted by the Congress which has declared that the district courts shall not entertain a suit brought in violation of a written agreement to arbitrate. (*Shanferoke* case, *supra*, 293 U. S. 449). As such it involves the *injunctive process* and has been regarded as an interlocutory injunction for purposes of appeal in the following cases:

(1) *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33 pp. 34-35 (CA 4): "The defendants moved for a stay of proceedings pursuant to section 3 of the United States Arbitration Act, 9 U.S.C.A. § 3, on the ground that the contract upon which suit was instituted provided for arbitration of the matters in suit. The District Court denied the stay, holding that the contract did not provide for arbitration of these matters and that the United States Arbitration Act had no application because of the exclusion clause contained in the first paragraph thereof. The defendants have appealed from this order; and we think it clear that the denial of stay in such case is, in effect, the denial of an interlocutory injunction, from which immediate appeal lies to this court. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 St. Ct. 313, 79 L. Ed. 583; Enelow v. N. Y. Life Ins. Co., 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440."

(2) *American Locomotive Co. v. Chemical Research Corp.*, 171 F. 2d 115, 119, (CA 6): "[1] The orders [denying stay of proceedings under the Arbitration Act] from which the appeals are taken are not final but are appealable interlocutory orders within the provisions of 28 U.S.C.A. §§ 225 (b) and 227, recodified as of September 1, 1948 as 28 U.S.C.A. § 1292 (1). Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; Gatliff Coal Co. v. Cox, 6 Cir., 142 F. 2d 876."

(3) *Markel Electric Products, Inc. v. United Electrical, Radio & Machine Workers of America, U. E. et al.*, 202 F. 2d 435, 437, (CA 2): "[1] Such an order is appealable since it is the equivalent of the denial of an injunction. Enelow v. New York Life Ins. Co., 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., 4 Cir., 168 F. 2d 33."

(4) *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, 930 (an action on the *equity* side): "The order stayed the trial of the action on application of appellees pursuant to 9 U.S.C.A. § 3. Such a stay is, in effect, an injunction. Hence the order was appealable" [citing the *Enelow* case, *supra*, 293 U. S. 379; the *Shanferoke* case, *supra*, 293 U. S. 449; the *International Union* case, *supra*, 168 F. 2d 33; the *American Locomotive* case, *supra*, 171 F. 2d 115 and *Gatliff Coal Co. v. Cox* (CA 6) 142 F. 2d 876].

The case at bar is the first, to our knowledge, in which a court of appeals has ruled that an order issued under Section 3 of the United States Arbitration Act is not appealable and it is in direct conflict with the *Hudson Lumber* case, *supra*.

The ruling of the Second Circuit, we submit, not only creates an irrational result but is unsound in principle and is contrary to the intent of Congress.

It creates an irrational result because it permits the party who brings suit in violation of the arbitration agreement to determine the injunctive character of an Arbitration Act order. Had respondent in the present case merely sued for damages, it was conceded that the order denying the stay would have been appealable but by seeking an accounting as well as damages it is contended that the order is not appealable.

But more important still is the fact that the function of arbitration would be defeated, if the order is not appealable. If defendant must first answer and proceed with an accounting in compliance with legal rules of evidence, it would become pointless on appeal from the final order to assert the simpler and less costly and less technical trial by the arbitrators. The damage — costly litigation — would have been done.

The order denying the stay, therefore, was not administrative in character such as one requiring a party to submit to a physical examination (*Bowles v. Commercial Cas. Ins. Co.* (CA 4) 107 F. 2d 169) or to furnish certain data to the adverse party (*O'Malley v. Chrysler Corp.* (CA 7) 160 F. 2d 35), which are not appealable. The order here, in effect, is an injunction denying enforcement of substantial arbitral rights. The test is succinctly stated by Professor Moore as follows: "An order requiring a defendant to do or refrain from doing something that is an integral part of the very matter in litigation, and invokes the normal equitable principles underlying the injunctive process should be regarded as an injunction: final if completely determinative of the matter in litigation, otherwise interlocutory in

character" (*Moore's Commentary on The U. S. Judicial Code* (1949 ed.) p. 491).

This Court has already said that it was the intent of Congress to *enjoin* controversies by Section 3 of the United States Arbitration Act even though arbitration could not *be compelled; Shanferoke, supra*, 293 U. S. pp. 452-453: "* * * Section 3 of the United States Arbitration Act provides broadly that the court may 'stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.' We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with § 4 of the Act. *Marine Transit Corp. v. Dreyfus*, 284 U. S. 263, 274, 76 L. ed. 282, 288, 52 S. Ct. 166, is not to the contrary. There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel the arbitration. For otherwise, despite congressional approval of arbitration, it would be impossible to secure a stay of an action in the federal courts when the arbitration agreement provides for compulsory proceedings exclusively in the state courts; since only in exceptional circumstances may a state court enjoin proceedings begun in a federal court."

In accordance with this ruling it was said in *Donahue v. Susquehanna Collieries Co.* (CA 3) 138 F. 2d 3, at page 5: "* * * in § 3 the statute deals with the conduct of suits in federal courts, again a subject matter of congressional power. The language becomes general: 'any suit or proceeding', upon 'any issue referable to arbitration under an agreement in writing for such arbitration' are the words. Congress is not limited, in legislating as to law suits in

federal courts, to those suits involving matters where the substantive rights of the parties may be controlled by federal legislation. The generality of the language used in the statute does not suggest any self-imposed limitation. Nor do we think that the 'congressional approval of arbitration' should be so limited by implication, by a grudging type of construction carried down from the days of judicial hostility to all arbitration agreements. We think it clear that the provisions of § 3 are not to be limited to the specific instances dealt with in §2."

To the same effect see: *Agostini Bros. Bldg. Corp. v. U. S.*, 142 F. 2d 854 and *Lewittes & Sons v. United Furniture Workers of America*, CIO, 95 F. Supp. 851.

By Section 3 of the Arbitration Act, Congress has seen fit to deny access to the federal courts to a suitor who goes to court in violation of an agreement to arbitrate and by that section has directed the district courts in proper cases to stay such an action pending arbitration. Petitioner therefore submits that whenever this limitation on the jurisdiction of the district courts is invoked under Section 3, any order granting or denying a stay is in substance an interlocutory injunction.

In the court below, respondent also relied on *Shoenamsgruber v. Hamburg American Lines*, 294 U. S. 454, which, we submit, is distinguishable from the case at bar. There an *admiralty* action was brought against a steamship company for damages on account of personal injuries inflicted upon an infant passenger. The company denied the material allegations of the libel and set up an arbitration agreement as the basis for a stay under Section 3 of the Arbitration Act. The libelants opposed the application for a stay claiming that the child was carried as a passenger not under

the contract alleged in the steamship company's answer, but under another contract that contained no provision for arbitration. The court ordered the parties to arbitrate and granted a stay of the admiralty action pending the filing of the award. The Court of Appeals held that the interlocutory stay order was not appealable and this Court affirmed because courts of *admiralty* do not issue *injunctions* except in a limitation of liability proceeding. The Court there said (pp. 457-458): "While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions."

Not being regarded as an injunction, the stay order in the *Shoenamsgruber* case was obviously not appealable under the provisions of subsection (1) of Section 1292 of the Judicial Code. Finally, none of the other cases relied on below by respondent involved a stay under the Arbitration Act.

CONCLUSION

Both the language of Section 3 of the United States Arbitration Act and the interpretation put upon it by this Court make it clear that an order granting or denying a stay under the provisions of that section is regarded as an interlocutory injunction for purposes of appeal.

It is therefore respectfully requested that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

MORRIS ROSENBERG,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 31

BALTIMORE CONTRACTORS, INC.,
Petitioner,

vs.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

Neither the opinion of the district court (R. 21-22) nor that of the United States Court of Appeals for the Second Circuit (R. 22) is reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22). The petition for a writ of certiorari was filed on March 8, 1954, and was granted on April 12, 1954. (R. 30). The jurisdiction of this Court rests upon 28 USCA 1254 (1).

Question Presented

Whether in an action for an *accounting* an order denying a stay under section 3 of the United States Arbitration Act should be regarded as a denial of an interlocutory injunction from which an appeal lies under section 1292 (1) of the Judicial Code.

Statutes Involved

Title 9 USCA section 3 (U. S. Arbitration Act):

> "*Stay of proceedings where issue therein referable to arbitration*
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Title 28 USCA section 1292 (1):

> "*Interlocutory decisions*
>
> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, * * *".

Statement

This action for an accounting and for a judgment for a share of net profits under a written agreement was com-

menced by Jacob H. Bodinger, respondent, in the Supreme Court of the State of New York, County of New York in April, 1953, and was removed by petitioner to the United States District Court for the Eastern District of New York on the ground of diversity of citizenship (R. 3, 6-7, 13, 18).

Paragraph "Third" of the agreement sued on in part provides (R. 18, 8, 22):

> "In the event of any dispute in the calculation of the net profits under this paragraph Frenkil (referring to petitioner's president) shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute."

Petitioner moved for a stay of the action (R. 3, 21) pursuant to the provisions of section 3 of the United States Arbitration Act (9 USCA 3) authorizing such a stay "upon any issue referable to arbitration under an agreement in writing for such arbitration."

On November 4, 1953, the district court passed an order denying petitioner's application for a stay pending arbitration (R. 5-6) from which order petitioner took an appeal to the United States Court of Appeals for the Second Circuit (R. 4) on November 9, 1953.

On December 7, 1953, respondent moved the Court of Appeals for an order dismissing the appeal on the ground that the order appealed from was not an appealable order (R. 1, 2). On December 11, 1953, the Court of Appeals granted respondent's motion to dismiss the appeal by entering an order reading "Motion granted. See *Morgantown v. Royal Ins. Co.*, 337 U. S. 254" (R. 22).

By an order of this Court entered on December 29, 1953, all proceedings before the district court were stayed pending timely filing and disposition of a petition for certiorari.

Summary of Argument

Ever since 1935, when this court decided *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, an order granting or refusing a stay under section 3 of the United States Arbitration Act has been regarded as an interlocutory injunction from which an appeal lies under the provisions of the Judicial Code now consolidated in 28 USCA 1292 (1). This was so whether the action sought to be stayed was brought on the "law side" or the "equity side" of the district court. See *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, where the action was on the "equity side", and *Markel Elec. Products v. United Elec. R. M. W. of Am.* (CA 2) 202 F. 2d 435, where the action was on the "law side". The Court of Appeals for the Second Circuit, however, in the instant case has ruled in direct conflict with the *Hudson Lumber Co.* case, *supra*, that such an order is *not* appealable when the action is brought on the "equity side".

Respondent concedes that in an action at law, an Arbitration Act order is appealable but seeks to draw a distinction between an action at law and one in equity, relying on the fictional injunction theory applied in *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, and in *Ettleson v. Metropolitan Life Ins. Co.*, 317 U. S. 188.

The fiction of *Enelow* and *Ettelson* seem to have been done with by the majority of this Court in *Morgantown v. Royal Ins. Co.*, 337 U. S. 254. (See Moore's *Commentary on the U. S. Judicial Code* (1949 ed.) paragraph 0.03 (52) pp. 492-494). But whether or not that fiction still prevails,

petitioner contends (1) that an Arbitration Act stay order is a statutory stay authorized by the Congress to be granted in a cause *before* the district court pending determination of issues in *another cause*, namely, the arbitration proceeding; (2) that such a stay is injunctive in character (a) because in staying one cause in favor of another, the normal equitable principles underlying the injunctive processes are invoked; (b) because non-appealability of such an interlocutory stay order would give rise to judicially sanctioned irreparable procedural injury which could not be undone by an appeal from the final order and (c) because this Court has in effect held in the *Shanferoke* case, 293 U. S. 449, *supra*, that such a stay order is injunctive in character and therefore appealable.

Argument

An Order Denying a Stay Under Section 3 of the United States Arbitration Act Should be Regarded as an Interlocutory Injunction Appealable Under Title 28 USCA Section 1292 (1).

A brief historical review of Title 28 USCA section 1292 (1) will show that interlocutory injunctions are appealable. When the circuit courts of appeals were established by the Act of 1891, section 7, provision was made for an appeal from an "interlocutory order or decree granting or continuing" such an injunction (26 Stat. 828). The section was amended by the Act of February 18, 1895, c. 96, 28 Stat. 666, to give an appeal where an interlocutory injunction was *refused* or *dissolved*. Although this additional provision for appeal was repealed by the Act of June 6, 1900, 31 Stat. 660 (*March v. Romare* (CA 5) 116 F. 354), it was restored in the broadest terms by section 129 of the Judicial Code, 28 USCA 227 (1940) and is substantially carried forward as Title 28 USCA section 1292 (1). See Moore's

Commentary on The U. S. Judicial Code (1949 ed.) page 42, note 15 in subhead (5).

The first case in which this Court passed on the appealability of an arbitration act stay order was *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, decided in 1935. There an action at law for damages for breach of a contract was stayed under section 3 of the United States Arbitration Act, and Mr. Justice Brandeis, speaking for this Court said (p. 451): "Being an interlocutory order, it was appealable to the Circuit Court of Appeals under §129, only *if the denial of the stay should be deemed the denial of an injunction*" (italics supplied). The denial of the stay was held to be the denial of an injunction. Applying the theory of *Enelow v. New York L. Ins. Co.*, 293 U. S. 379, the opinion stated that: "an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under §274 b. U.S.C. Title 28 §398, is appealable under §129; * * * and that the motion for a stay is an application for an interlocutory injunction based on the special defense" (293 U. S. 452).

What is known as an "equitable defense" stemmed from the old English chancery practice under which the law-defendant with the basis went into equity as a plaintiff and obtained an injunction against the law-plaintiff from further prosecuting his law action. If the law action was stayed pending final determination of the equity action, the law-defendant was granted an interlocutory injunction which *in fact* was issued by the chancellor.

But in federal practice, separate law and equity courts have never existed, although there was a law and an equity side which was not completely changed by The Law & Equity Act of 1915 (28 USCA 397, 398) (see 2 Moore's *Federal Practice*, (1948 ed.) par. 2.05 [2], p. 336, etc.).

In the *Enelow* case, an equitable defense of fraud in obtaining a life insurance policy was interposed in the suit on the policy brought on the law side of the court and the equitable issues were set down for trial prior to the legal issues on the theory that an interlocutory injunction had been granted against the action at law although *in fact* none had been issued.

Later, even after the Federal Rules had united law and equity, thereby abolishing the law and equity side, the fictional injunction of the *Enelow* case was again used in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, in a similar situation and the interlocutory order was held to be an interlocutory injunction, and therefore appealable.

Then came *Morgantown v. Royal Ins. Co.*, 337 U. S. 254, where the theory of the *Enelow* case and the fictional injunction could have been, but was not applied by the majority of this Court. This was an action for reformation of an insurance policy on the basis of mutual mistake; the defendant denied mistake and filed a counterclaim to recover on the policy as written. After issue was joined on the counterclaim, the defendant filed a demand for a jury trial under Rule 38(b) and the district court granted the plaintiff's motion to strike the demand and set the case for trial by the court without a jury. On appeal, the court of appeals refused to treat the interlocutory order as an order granting or denying an injunction and dismissed the appeal. This Court affirmed. It could have, according to Professor Moore,* "applied historical analogies and reached the same result: that an order denying the defendant a jury trial on his counterclaim at 'law' interposed in plaintiff's suit in 'equity' in advance of the plaintiff's equitable issues was

* Moore's *Commentary on The U. S. Judicial Code*, pp. 493-494

not an injunction by a chancellor, but a mere stay of the legal proceedings by a common law judge. [This is the position taken by Justice Frankfurter in his concurring opinion.] Mr. Justice Murphy speaking for the majority of the Court did not choose to do so. While he did not expressly overrule *Enelow* and *Ettelson*, his theory and language impliedly do. 'This is not a situation, he stated, where a "chancellor" in denying a demand for jury trial can be said to be enjoining a "judge" who has cognizance of a pending action at law. This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed. The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from common-law practice which supported our conclusions in the *Enelow* and *Ettelson* cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one.' [Justices Black and Rutledge dissenting regard the case as overruling *Ettelson v. Metropolitan Ins. Co.*]."

But whether or not the theory of the *Enelow* case has been overruled by implication, it is submitted that there is no need to resort to a legal fiction in order to uphold the order in the instant case as an appealable order. Here the district court is empowered by section 3 of the Arbitration Act to enjoin the action *in fact* before it in favor of issues to be tried in an arbitration proceeding.

This is not "a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself" but rather a case in which an action *before* the district court is stayed while issues are to be tried in *another forum* pursuant to the written agreement between the parties (R. 18, 8, 22). The arbitral proceeding is not a part of the accounting action instituted by respondent, nor is the accounting action a part of the arbitration proceeding. Since each is independent of the other and in a different forum, *enjoining or refusing to enjoin the prosecution of the one in favor of the other* should be regarded as the grant or refusal of an injunction.

This, we submit, is the rationale of the rule in the *Enelow* case where Mr. Chief Justice Hughes, in interpreting section 129 of the Judicial Code, now §1292, said for this Court (293 U. S. pp. 381-382):

> "This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of §129."

Certainly, if the district court can invoke its general equitable jurisdiction to issue a fictional injunction to stay a proceeding "in another court" there seems to be no reason why it cannot invoke that power to stay a proceeding actually before it in favor of issues to be tried in another

forum. Whether the stay order arises out of a fictional proceeding, as in the *Enelow* case, or by virtue of an Act of Congress, as in the present case, the injunctive character of the stay order is the same. In either event, the order stays one proceeding while issues are to be tried in another.

The *Morgantown* case, relied on by the court below and by the respondent, is clearly distinguishable for it is held to be "a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself."

To put it another way, the *Morgantown* case was not a case in which a stay would enjoin one action pending issues to be tried in another, as is the instant case.

Therefore, the test of appealability of the stay order is not whether the action was commenced "at law" rather than "in equity", as respondent contends, but whether the order in substance invokes the normal equitable principles underlying the injunctive processes. If it is the latter, it should be regarded as an injunction and it has been so regarded for purposes of appeal in the following cases:

(1) *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33 pp. 34-35 (CA 4): "The defendants moved for a stay of proceedings pursuant to section 3 of the United States Arbitration Act. 9 U. S. C. A. §3, on the ground that the contract upon which suit was instituted provided for arbitration of the matters in suit. The District Court denied the stay, holding that the contract did not provide for arbitration of these matters and that the United States Arbitration Act had no application because of the exclusion clause contained in the first paragraph thereof. The defendants have appealed from this order; and we think it clear that the denial of stay in such case is, in effect, the denial of an interlocutory injunction, from which

immediate appeal lies to this court. *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; *Enelow v. N. Y. Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440."

(2) *American Locomotive Co. v. Chemical Research Corp.*, 171 F. 2d 115, 119, (CA 6): "[1] The orders [denying stay of proceedings under the Arbitration Act] from which the appeals are taken are not final but are appealable interlocutory orders within the provisions of 28 U.S.C.A. §§225(b) and 227, recodified as of September 1, 1948 as 28 U.S.C.A. §1292(1). *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; *Gatliff Coal Co. v. Cox*, 6 Cir., 142 F. 2d 876."

(3) *Markel Electric Products, Inc. v. United Electrical, Radio & Machine Workers of America, U. E. et al.*, 202 F. 2d 435, 437, (CA 2): "[1] Such an order is appealable since it is the equivalent of the denial of an injunction. *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; *Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp.*, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; *International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co.*, 4 Cir., 168 F. 2d 33."

(4) *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, 930 (an action on the equity side): "The order stayed the trial of the action on application of appellees pursuant to 9 U.S.C.A. §3. Such a stay is, in effect, an injunction. Hence the order was appealable" [citing the *Enelow* case, *supra*, 293 U. S. 379; the *Shanferoke* case, *supra*, 293 U. S. 449; the *International Union* case, *supra*, 168 F. 2d 33; the *American Locomotive* case, *supra*, 171 F. 2d 115 and *Gatliff Coal Co. v. Cox* (CA 6) 142 F. 2d 876].

The instant case is the first, to our knowledge, which has ruled that an order issued under section 3 of the United

States Arbitration Act is not appealable and it is in direct conflict with the decision in the *Hudson Lumber Co.* case, *supra*, which like the case at bar, originated on the "equity side" of the district court.

It is also important to observe the statutory nature of the stay order. It is not granted or refused by the district court "by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice" but by virtue of a statutory mandate of the Congress under which district courts are interdicted from entertaining a suit brought in violation of a written agreement to arbitrate. Issued to effectuate the statutory policy, such an order obviously is intended to enjoin or refuse to enjoin the action before the district court in favor of issues to be tried before another tribunal, and its injunctive character is therefore clear.

It is submitted that the ruling of the Second Circuit in the present case not only creates an irrational result but is unsound in principle and is contrary to the intent of Congress. It creates an irrational result because it permits the party who wishes to sidestep arbitration to interdict an immediate appeal on the stay issue by simply *asking* for an accounting. Had respondent in the present case merely sued for damages, he concedes that an immediate appeal would lie from the order issued but by asking for an accounting as well as damages he contends that such an appeal is prohibited.

But more important still is the fact that the function of arbitration would be defeated if the order is not immediately appealable. If defendant must first answer and proceed with an accounting in compliance with legal rules of evidence, it would become pointless on appeal from the

final order to assert the simpler and less costly and less technical trial by the arbitrators. The damage — costly litigation — would have been done. If it is held that the appellate court is powerless to correct an error of that nature, the effect would be a denial to one of the parties of the forum to which he is entitled.

This Court has already ruled in the *Shanferoke* case that it was the intent of Congress to *enjoin* controversies by section 3 of the United States Arbitration Act, even though arbitration could not be *compelled*. It there said (293 U. S. pp. 452-453):

> "* * * Section 3 of the United States Arbitration Act provides broadly that the court may 'stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.' We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with §4 of the Act. *Marine Transit Corp. v. Dreyfus,* 284 U. S. 263, 274, 76 L. ed. 282, 288, 52 S. Ct. 166, is not to the contrary. There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel the arbitration. For otherwise, despite congressional approval of arbitration, it would be impossible to secure a stay of an action in the federal courts when the arbitration agreement provides for compulsory proceedings exclusively in the state courts; since only in exceptional circumstances may a state court enjoin proceedings begun in a federal court."

In accordance with this ruling it was said in *Donahue v. Susquehanna Collieries Co.* (CA 3) 138 F. 2d 3, at pages 5 and 6: "* * * in §3 the statute deals with the conduct of suits in federal courts, again a subject matter of con-

gressional power. The language becomes general: 'any suit or proceeding', upon 'any issue referable to arbitration under an agreement in writing for such arbitration' are the words. Congress is not limited, in legislating as to law suits in federal courts, to those suits involving matters where the substantive rights of the parties may be controlled by federal legislation. The generality of the language used in the statute does not suggest any self-imposed limitation. Nor do we think that the 'congressional approval of arbitration' should be so limited by implication, by a grudging type of construction carried down from the days of judicial hostility to all arbitration agreements. We think it clear that the provisions of §3 are not to be limited to the specific instances dealt with in §2."

To the same effect see: *Agostini Bros. Bldg. Corp. v. U. S.*, 142 F. 2d 854, and *Lewittes & Sons v. United Furniture Workers of America, CIO*, 95 F. Supp. 851.

The statutory power of the district court to enjoin an action although it cannot compel arbitration of the controversy further demonstrates the injunctive character of an order issued under the provisions of section 3 of the Arbitration Act.

Respondent relies on *Shoenamsgruber v. Hamburg American Lines*, 294 U. S. 454, which, we submit, is distinguishable from the case at bar. There an *admiralty* action was brought against a steamship company for damages on account of personal injuries inflicted upon an infant passenger. The company denied the material allegations of the libel and set up an arbitration agreement as the basis for a stay under section 3 of the Arbitration Act. The libelants opposed the application for a stay claiming that the child was carried as a passenger not under the

contract alleged in the steamship company's answer, but under another contract that contained no provision for arbitration. The court ordered the parties to arbitrate and granted a stay of the admiralty action pending the filing of the award. The Court of Appeals held that the interlocutory stay order was not appealable and this Court affirmed because courts of *admiralty* do not issue *injunctions* except in a limitation of liability proceeding. The Court there said (294 U. S. 457-458): "While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions."

Because the court lacked general equitable jurisdiction to issue an injunction in the *Shoenamsgruber* case, the order there was obviously not appealable under the provisions (1) of section 1292 of the Judicial Code.

Conclusion

Since an interlocutory order granting or refusing a stay under the provisions of section 3 of the United States Arbitration Act, when issued by a district court exercising general equitable jurisdiction, is injunctive in character, it should be regarded as an interlocutory injunction for purposes of appeal.

It is therefore respectfully requested that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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FILED
OCT 20 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 31

BALTIMORE CONTRACTORS, INC.,
Petitioner,

vs.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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THE FALLACIES OF THE RESPONDENT'S ARGUMENT

The respondent's argument has two fundamental fallacies: (1) it erroneously assumes that there is only *one* method (an equitable defense in an action at law) by which a court of both law and equity powers can issue an *injunction* restraining a plaintiff from pursuing the remedy of his action; and (2) it overlooks the fact that a Section 3 Arbitration Act order is injunctive in substance.

1. The Erroneous Assumption That There is Only One Method (Equitable Defense in an Action at Law) by Which an Injunction May Issue to Restrain the Prosecution of an Action.

The respondent's argument is that *only* when the plaintiff's action is on the law side of the court can a stay entered under Section 3 of the federal Arbitration Act (9 USC 3) amount to an injunction because "an injunction may be granted only in equity" and "it must be directed against the other side of the court — the law side — to permit the legal fiction that there are two actions present and that one is staying the other. If the action itself is in equity, and if the defense upon which the stay is based also is equitable, then there is only one indivisible action and no basis whatever for the legal fiction, necessary to *Enelow* and *Shanferoke*, of two actions, one operating against the other" (respondent's brief pp. 10-11).

Implicit in this argument is the contention that a court of equity will not enjoin its own proceedings, a contention which has been rejected by the courts.

In the case of *The Erie Railroad Company v. Ramsey* (1871) 45 N. Y. 637, where an injunction restraining the further prosecution of *another* equitable action in the same court was upheld, the Court of Appeals of New York said (p. 650 of 45 N. Y.):

> "* * * it has been said in general terms by courts of chancery, that the court does not enjoin its own proceedings * * * It is true, however, that a court of equity has restrained and does restrain its own suitors. Drewey on Injunctions, 105, states it as well settled, that court of equity will exercise jurisdiction to restrain other proceedings in the same court. So in *Willard On Equity Jurisprudence*, 350, 351, it is said: 'As an injunction to restrain proceedings at law is di-

> rected only to the parties, and assumes no superiority over the court in which the action is pending but is granted solely on the ground that some equitable circumstances exist, which render the prosecution at law against conscience; there is no reason why an injunction should not be granted by the court in which the action is pending, if the court has jurisdiction both at law and in equity'."

The same rule was also recognized in *Farwell v. Great Western Telegraph Co.*, 161 Ill. 522, 44 N. E. 891, 922, where the court said (p. 617 of 161 Ill.):

> "On principle and authority, it must be held that, in a case demanding it, jurisdiction exists in a court of equity to grant an injunction in one action to affect the proceedings in another action already pending in the same court, whether they be actions at law or in equity."

Likewise in *Trees v. Glenn*, 319 Pa. 487, 490, 181 A. 579, 580, 102 A. L. R. 305, the court said:

> "Appellant's counsel argue that equity will refuse to enjoin a party from proceeding in equity. They are mistaken in this. Under certain conditions an equity court will issue its process to restrain a litigant from proceeding in another equity tribunal."

See also:

> *Mann v. Flowers*, 26 Minn. 479, 5 N. W. 365; Annotation 102 A. L. R. 308.

The Court of Appeals of New York in the *Ramsey* case, *supra*, also ruled that the restraint could issue in the very action on the equity side if all of the parties are before the court, or by an appropriate equitable cross action bringing in the necessary parties; and that under either method the restraint is by an injunction. Said the court (p. 649 of 45 N. Y.):

"If it be said that the court can act upon its suitors by way of *restraint* in the very action which they are then prosecuting before it, one answer is that all the persons to be *restrained* and *affected by injunction*, temporary and perpetual, may not be parties to that action, and so not in the power of the court (Story, Eq. Juris., §891b) * * *. So that it may well be, that in an action pending in a court of both law and equity powers, the tribunal may not be able to mete out full justice to the parties litigant in the action pending before it, without entertaining a cross action, in which other facts shall be presented and other persons made parties, and in which last action, it may be needful that an injunction order issue, restraining the prosecution of the first. (See *Thursby v. Wills*, 1 Code Rep. 83.) And accordingly we find the circuit courts of the United States, on the equity side, entertaining a bill and awarding an injunction to restrain proceedings on the law side thereof. And it is held that this may be done before the commencement of the suit at law, pending such suit, or after its decision by the highest law tribunal. (*Parker v. Judges, etc.*, 12 Wheat. 561; *Dunlop v. Sisson*, 4 Mason 349; *Humphrey v. Leggett*, 9 Ho. U. S. 297; *Nixdorff v. Smith*, 16 Peters 132)" (Italics supplied).

Where not restricted by statute, the federal courts in the exercising of their own equity powers have also restrained parties from commencing or prosecuting actions in equity.

See:

Commercial Acetylene Co. v. Avery Portable Lighting Co. (1906, E. D. Wis.) 15 2d F. 642, 644, affirmed in (1908-CA 7) 159 F. 935;

Missouri Railway Co. v. Jones (1909-W. D. Mo.) 170 F. 124;

Libbey Glass Co. v. McKee Glass Co. (1914-W. D. Pa.) 216 F. 172, affirmed in (1915-CA 3) 220 F. 672, writ of certiorari denied in (1915) 238 U. S. 624.

Therefore, the fact that the action in the present case is in equity rather than at law does not prevent the issuance of an injunctive restraining order. When the action is on the law side the equitable defense concept has been applied (*Shanferoke* case, 293 U. S. 449) and when the action is on the equity side the cross action concept could be applied, unless this Court should decide, as the majority did in the *Morgantown* case (257 U. S. 254), that the order itself should determine, without regard to archaic principles of procedure, whether it is injunctive in character.

2. Respondent has Overlooked the Fact That a Section 3 Arbitration Act Order is Injunctive in Substance.

It is most important to observe that the respondent does not contend that the object and purpose of the order in the *Shanferoke* case differs from the object and purpose of the order in the case at bar. The fact is their objective is identical. In each case an application for a stay is made under the same statute (9 USC 3) and in each case the statute conceives that the plaintiff should be restrained from recovering the remedy of his action pending arbitration in accordance with the agreement.

The respondent concedes that the order in the *Shanferoke* case has been regarded by this Court as an injunction and since the substance of the order in the instant case is identical and is also issued under equity powers, it too should be regarded as an injunction.

CONCLUSION

For the reasons given, the contentions of the respondent are without merit and the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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FILED
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IN THE

Supreme Court of the United States

October Term, 1953

No. 31

BALTIMORE CONTRACTORS, INC.,

Petitioner,

vs.

JACOB H. BODINGER

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 626

BALTIMORE CONTRACTORS, INC.,

Petitioner,

vs.

JACOB H. BODINGER

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit granting respondent's motion to dismiss petitioner's appeal is dated December 11, 1953 and reads as follows:

> "Motion granted. See Morgantown vs. Royal Ins. Co., 337 U. S. 254" (R. 22).

The opinion of the United States District Court for the Eastern District of New York denying petitioner's application for a stay pursuant to Section 3 of the United States Arbitration Act appears in the record (R. 21-22).

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22), and the jurisdiction of this Court is invoked under 28 USCA 1254(1).

Question Presented

Whether an order entered in an action in equity for an accounting (in which no answer or other pleading by defendant has been interposed), denying the defendant's motion to stay such equity action under Section 3 of the Arbitration Act, should be regarded as a denial of an interlocutory injunction within the meaning of 28 USCA 1292(1).

Statutes Involved

Title 28 USCA, Section 1292(1):

> "*Interlocutory decisions*
>
> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, * * *;".

9 USCA 3 (U. S. Arbitration Act):

> "*Stay of proceedings where issue therein referable to arbitration*
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue refer-

able to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Statement

The action herein is brought in equity for an accounting of the profits of a joint venture between respondent and petitioner (R. 6-13). The agreement between the respondent and petitioner concerning the said joint venture is in writing and is annexed to the complaint in the action (R. 14-21). The action was commenced by respondent in the Supreme Court of the State of New York, County of New York, and was removed at the instance of petitioner on the ground of diversity of citizenship to the United States District Court for the Eastern District of New York (R. 3). Petitioner, the defendant in the said action, served no answer or other pleading (R. 3), but instead made a motion for a stay of the action, under Section 3 of the United States Arbitration Act, upon the alleged ground that the written agreement provided for arbtiration of the matters in dispute (R. 2, 5). The District Court held there was no agreement to arbitrate (R. 21-22) and made an order denying petitioner's application for such stay (R. 5-6), from which order petitioner appealed to the United States Court of Appeals for the

Second Circuit (R. 4). The Court of Appeals dismissed petitioner's appeal on the ground that the order denying petitioner's application for a stay under Section 3 of the Arbitration Act was not appealable (R. 22).

ARGUMENT

Petitioner's contention that an order granting or denying a stay pursuant to Section 3 of the United States Arbitration Act (9 USCA 3) constitutes, in and of itself, a grant or denial of an interlocutory injunction within the meaning of 28 USCA 1292(1), completely ignores the uniform decisions of this Court establishing that a grant or denial of such an arbitration stay, or any other stay, does not constitute an interlocutory injunction, unless the stay is granted or denied by a court of equity and is intended to operate against an action *at law*.

1. Petitioner's brief does not expressly concede that the action herein is one in equity, although that concession is implicit in its argument. In any event, there should be no question that the action herein for an accounting of the profits of a joint venture between respondent and petitioner *is one in equity* and not at law. *Valdes* v. *Larrinaga*, 233 U. S. 705, 709; *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130, 134; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514-515.

2. The rule is that an order granting or refusing a stay, if made in the case in which the desired stay would operate, does not amount to a grant or denial of an injunction. It is only when the grant or denial of the stay is made in

a case other than that in which the stay would operate, that the stay is deemed to amount to an injunction. (*Emery* v. *Central Trust & Safe Deposit Co.*, 204 F. 965, 968.)

3. The decision of this Court in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, created the concept that, under certain special and precise circumstances, two separate actions, one at law and one in equity, are deemed to be present within the framework of what is regarded conventionally as a single case, so that a stay of the law side of the action until the determination of the equity side of the action will be regarded as an injunction by a court of equity against the action at law and, therefore, appealable under Section 129 of the old Judicial Code.

The *Enelow* case involved an action at law to recover the proceeds of a life insurance policy, to which the defendant interposed an equitable defense that the policy had been obtained by fraud. Defendant then requested a trial "by a Chancellor according to equity procedure in advance of the trial by a jury at law of any purely legal issues", pursuant to Section 274b of the old Judicial Code (former 28 USC, Sec. 398), which authorized the interposition of equitable defenses in an action at law and provided that "The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea." The District Court granted the petition. The plaintiff appealed and; upon affirmance by the Circuit Court of Appeals, the Supreme Court granted certiorari. The Supreme Court Chief Justice Hughes writing the opinion, held that the District Court's order essentially was the grant of an injunction by a court of equity against an action at law pending in a court of law, and hence was appealable. This

holding depended upon the Court's analysis of Section 274b and upon "the established distinction between 'proceedings at law and proceedings in equity in the National courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity.'" Thus, the Court there evolved the theory that one court (of equity) was staying another court (of law), and thereby enjoining the latter's proceeding, although the entire action took place under the title of a single action.

The *Enelow* decision made it clear that if the stay was not issued by a court of equity, or if it did not operate against an action at law, it would not amount to an injunction. Mr. Justice Hughes stated (293 U. S. at p. 382): "The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of Section 129 (and at p. 383) "It is thus apparent that when an order or decree is made under Section 274b, requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the Court had acted upon a bill of complaint in a separate suit for the same purpose."

The *Enelow* doctrine never has been extended, but remains restricted to a situation wherein an action at law is stayed solely on equitable principles in furtherance of an equitable defense pleaded in the answer.

The same special situation that existed in the *Enelow* case, *viz.*, an action at law being stayed on the basis of an

equitable defense set up in an answer, was presented to this Court later in the same year (1935) in *Shanferoke C. & S.* v. *Westchester S. Corp.*, 293 U. S. 449, wherein the action was to recover damages for breach of contract, to which the defendant by answer set up a special defense based upon an arbitration agreement, and then made a motion to stay the action pursuant to 9 USCA 3, until arbitration should be had. This court, applying the same theory it had evolved in the *Enelow* case earlier that year, held that the denial of the defendant's motion was the equivalent of the denial of an injunction, stating (293 U. S. at 452): "For the reasons stated in Enelow v. New York L. Ins. Co., an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under Sec. 274b, USC title 28, Sec. 398, is appealable under Sec. 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of Sec. 274b; and that the motion for a stay is an application for an interlocutory injunction based on the special defense."

Petitioner's argument that the *Shanferoke* decision holds that the arbitration stay *per se* constitutes an injunction, without regard to whether it is directed against an action at law or in equity, or whether it is based on a special equitable defense or not, is specious and completely ignores the above-quoted language of the decision which plainly holds that an arbitration stay, like any other stay, amounts to an injunction only when, as in the *Enelow* case, it is directed against an action at law in furtherance of an equitable defense pleaded in the answer.

Petitioner's claim that an arbitration stay is possessed *in itself* of some mysterious and unexplained qualities

which constitute it an injunction, without regard to the circumstances under which it is sought to be employed, is not borne out by the language of the statute authorizing such a stay (9 USCA 3) or the applicable decisions. To the contrary, the succeeding decision of this Court on the subject (*Schoenamsgruber* v. *Hamburg Amer. Line*, 294 U. S. 454) confirmed, as did the *Shanferoke* decision, that an arbitration stay, like any other type of stay, can be deemed an injunction only when directed against an action at law in furtherance of a special equitable defense pleaded in the answer.

The *Schoenamsgruber* case involved an action on a libel in admiralty claiming damages for personal injuries incurred on the defendant's steamship. The answer to the libel set up the defense that the contract of passage required the arbitration of claims. The defendant then applied for a stay of the action pursuant to the Arbitration Act (9 USCA 3), which was granted by the District Court. The Circuit Court of Appeals dismissed the appeal from the order granting the stay, holding the same to be interlocutory and not appealable, and this Court granted certiorari.

This Court, in affirming the holding of the Circuit Court of Appeals in the *Schoenamsgruber* case, pointed out that neither *Enelow* nor *Shanferoke* was authority for a ruling that the arbitration stay in the *Schoenamsgruber* case was appealable as an injunction, since the action in the latter case was in admiralty and not at law. The Court said (294 U. S. at p. 456-457):

> "Abandoning their claims that the orders are final, petitioners by supplemental brief argue that

> they are appealable under §129, U. S. C. title 28, §227. They rely on the Shanferoke Case. That decision was based on the Enelow Case. Each of these was an action at law in which the defendant by answer sought equitable relief. In each the order held appealable stayed proceedings on the law side and operated as an injunction, within the meaning of that section, against proceedings in another court. The cases now before us are in admiralty. The orders appealed from merely stay action in the court pending arbitration and filing of the award. As shown in the Enelow Case, they are not interlocutory injunctions within the meaning of §129. And plainly, so far as concerns appealability, they are not to be distinguished from an order postponing trial of an action at law to await the report of an auditor."

The *Schoenamsgruber* decision also pointed out (at p. 457) that admiralty courts lack general equitable jurisdiction and do not issue injunctions except in certain limited instances having no application to arbitration matters. This latter point, in itself, refutes petitioners contention that an arbitration stay *per se* constitutes an injunction, since an admiralty court, although without power to issue an injunction could, and did, grant arbitration stay.

The decision of this Court in *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 held that the *Enelow doctrine* continued to prevail despite the intervening statutory changes which removed some of the procedural distinctions between actions at law and those in equity (Rule 2 of Rules of Civ. Proc.). It is to be noted that the *Ettelson* case presented the classic *Enelow* situation, viz., an action at law sought to be stayed on the basis of an equitable defense pleaded in the answer.

The limitations of the *Enelow* doctrine still stand, and the requirements for the legal fiction created by that case and followed by *Shanferoke* never have been relaxed. If *Enelow* has not been overruled by *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, the latter case at least has made it plain that the special circumstances required in *Enelow* to constitute a stay as an interlocutory injunction will not be deviated from by one iota.

The *Morgantown* case involved an equitable action to reform an insurance policy, to which the defendant filed a counterclaim to recover the proceeds of the policy. Defendant's motion for a jury trial of the action was denied by the District Court, and the defendant appealed to the Court of Appeals from the order denying its demand for a jury trial, claiming that such order constituted an injunction against the maintenance of its action at law on the policy. The Court of Appeals, holding the order to be non-appealable, dismissed the appeal, and this Court granted certiorari. Since the language of Mr. Justice Frankfurter, in his opinion concurring with the majority in the *Morgantown* case, makes plain why the stay in the case at bar could not constitute an interlocutory injunction, we beg to quote therefrom (337 U. S. at pp. 260-1):

> "The facts, therefore, are precisely the opposite of those in the Enelow Case. Here there was no intervention by a court of equity in proceedings at law, but 'a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.' 293 U. S. at 381, 382. * * *

> "A layman may see no difference between the postponement by a trial judge of an action at law, and the postponment of such an action by an equitable proceeding resulting in an interlocutory injunction. But the Congress has seen fit to allow an appeal from one such result and not from the other. Non-appealability of intermediate orders in the federal courts has been a deep-rooted general principle limiting those courts since their establishment. A very few types of interlocutory orders are appealable. The Enelow and Ettelson Cases presented an order that was appealable because it was a stay by a court of equity of a common-law action. This is not such a stay, and in affirming the judgment the Court leaves Enelow and Ettelson untouched."

Thus, if *Enelow* and *Shanferoke* still stand at all, their requirements must at least be strictly met to constitute any stay as an appealable injunction.

The very first of these requirements, that the action sought to be stayed be one *at law,* is lacking in this case since, as shown above, the action herein is *in equity.*

The requirement that the action sought to be stayed be at law is not specious or arbitrary. It is basic to the legal fiction that two separate actions—two sides of the court—are operating, one against the other, under the caption of a single case. Aside from the fact that both *Enelow* and *Shanferoke* were rationalized on the basis of Sec. 274b of the old Judicial Code, which applied only to actions at law wherein equitable defenses or cross-bills were interposed, it further remains that *an injunction may be granted only by a court of equity* "in the enforcement of equitable principles" and "exercising what is essentially an equitable jurisdiction" (293 U. S., at pp. 382, 383). Since the stay,

to be deemed an injunction, must be granted by a court of equity, it must be directed against the other side of the court—the law side—to create the legal fiction that one side of the court is staying the other side. Furthermore if the stay, to be an injunction, must be granted by a court of equity, and if the action sought to be stayed were also in equity, there would be only one indivisible action, and no basis whatever for the legal fiction, necessary to *Enelow* and *Shanferoke*, which conceives two actions, one operating against the other, within a single case heading. Thus, the fact that the case at bar, sought to be stayed by petitioner, is in equity and not at law, is sufficient to establish that the denial of petitioner's arbitration stay did not amount to a denial of an injunction.

With the exception of *Hudson Lumber Co.* v. *U. S. Plywood Corp.* (CA 9), 181 F. 2d 929, the Courts of Appeals of the various Circuits seem to have found no difficulty in understanding that it is a basic requirement of the *Enelow* and *Shanferoke* decisions that the action sought to be stayed must be at law, in order that the stay be deemed injunction; and with the exception of the said *Hudson Lumber* case we have found none in which a stay was deemed to be an appealable injunction, unless the action sought to be stayed was one at law. Thus, in *International Union* v. *Colonial Hardwood*, 168 F. 2d 33, *American Locomotive Co.* v. *Chemical Research Corp.*, 171 F. 2d 115, and *Markel Electric Prod. Inc.* v. *United Elec. Radio and Machine Workers, etc.*, 202 F. 2d 435, all cited by petitioner, each of the actions sought to be stayed was at law to recover damages for breach of contract.

It was only in the *Hudson Lumber* case (181 F. 2d 929, 930) that the action stayed was one in equity; and upon that

single decision petitioner predicates its claim of a "conflict". However, the decision of the Court of Appeals for the 9th Circuit in the *Hudson Lumber* case fails completely to show upon what basis, or by what process of reasoning, it arrived at its perfunctory conclusion that the order granting a stay there was appealable as an injunction. The said decision merely cited in a footnote (181 F. 2d at p. 930) the *Enclow* and *Shanferoke* cases and decisions of Courts of Appeals, *in all of which the actions sought to be stayed were at law.* The *Hudson Lumber* case, therefore, does not create a "conflict" in the true sense of the term, but appears to be nothing more than a misunderstanding, without reasoning or explanation given, of the cases it cited in its footnote and of the uniform decisions of this Court. This misunderstanding by the Court of Appeals for the 9th Circuit may have been contributed to by the fact that no issue was raised in that case as to the jurisdiction of the appeal, such jurisdiction having been perfunctorily conceded in the appellee's brief. Certainly the *Hudson Lumber* case does not appear to furnish any occasion for this Court to reconsider its uniform decisions on the subject.

4. If the action herein had been at law, and not in equity, the stay sought by petitioner still would have failed to achieve the status of an injunction because of the lack of a special equitable defense pleaded in an answer. As shown above, an injunction may only be issued by a court of equity on equitable principles (293 U. S. at pp. 383, 383) and must constitute an "intervention by a court of equity" (337 U. S. at p. 261). Here, however, the arbitration stay sought by petitioner pursuant to 9 USCA 3 was merely one for relief under a statute which precluded any discretion-

ary or equitable considerations by the court. The determination of petitioner's application for such stay depended merely upon whether or not there was an agreement to arbitrate the disputed issues, and that determination did not, and could not, involve the exercise by the District Court of the discretion essential to the consideration of an injunction or other equitable relief (*American Locomotive Co.* v. *Chemical Research Corp.* (CA 6), 171 F. 2d 115, 122). Therefore, when not based upon a special equitable defense, the motion for an arbitration stay is devoid of any equitable character.

In *Shanferoke,* as in *Enelow,* the stay was regarded as equitable, because it was based on a special equitable defense pleaded in the answer (293 U. S. at p. 452). Here, however, the petitioner interposed no answer, defense or pleading of any kind, but merely made a motion pursuant to 9 USCA 3 (R. 3). Therefore, there was no special equitable defense pleaded by the defendant to which the application for a stay could be attributed, and from which it might be deemed to have acquired equitable characteristics. As stated in *Gatliff Coal Co.* v. *Cox,* 142 F. 2d 876, 879, which involved an arbitration stay directed against an action at law, "* * * the Supreme Court held that an order granting a stay of proceedings which was based on an equitable defense or cross-bill interposed in an action at law was an appealable interlocutory order * * * A special defense setting up an arbitration agreement is an equitable plea and the denial of a motion for a stay under the Arbitration Act, 43 Stat. 883, Title 9 USCA §3 is the denial of an application for an interlocutory injunction based on a special defense. *Shanferoke Company* v. *Westchester Company, supra.*" Furthermore, the existence of only one

pleading in the case—the complaint—without any pleading at all of the defendant, precludes even an illusion that there are two actions in this case, one staying the other; and without that the stay cannot in any event be deemed an injunction.

5. Petitioner's argument that it is deprived of a right of appeal by respondent's selection of an equitable form of action overlooks two facts (i) that on the basis of the allegations of the complaint (R. 10-12), respondent had no choice but to bring this action in equity for an accounting instead of at law for damages; (2) that if petitioner's motion for a stay had been granted instead of denied, respondent would have had no right to appeal from the grant of such stay.

6. Petitioner's brief, in complaining that the order denying its stay "in effect, is an injunction denying enforcement of substantial arbitral rights" (p. 14), completely ignores the facts, as well as the law. Petitioner controlled whatever was or was not done under the so-called "arbitration" clause herein, since petitioner's president, Frenkil, had the sole power to appoint the accountants to act thereunder (R. 3, 18). This action has been pending almost a full year without having been noticed for trial because of the non-service of an answer by petitioner (R. 3, 28). If there had been anything to be done under the said clause, petitioner had more than ample time to have it done; and in that, petitioner was in no way hampered or delayed, much less enjoined, by the denial of a stay. It would seem that petitioner's sole interest in the said clause was in its effectiveness in delaying, if not staying, this action.

CONCLUSION

The order denying petitioner's application for a stay pursuant to 9 USCA 3 did not constitute an interlocutory injunction and was not appealable under 28 USCA 1292(1). It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES WILSON
Attorney for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 31

BALTIMORE CONTRACTORS, INC.,

Petitioner,

vs.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BALTIMORE CONTRACTORS, INC.,

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VS.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit granting respondent's motion to dismiss petitioner's appeal is dated December 11, 1953 and reads as follows:

> "Motion granted. See *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254" (R. 22).

The opinion of the United States District Court for the Eastern District of New York denying petitioner's application for a stay pursuant to 9 USCA 3 appears in the

record (R. 21-22). Neither opinion has officially been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22). The petition for a writ of *certiorari* was filed on March 8, 1954, and was granted on April 12, 1954 (R. 30). The jurisdiction of this Court rests upon 28 USCA 1254 (1).

Question Presented

Whether an order entered in an action in equity for an accounting denying defendant's motion to stay that action pursuant to 9 USCA 3 constitutes the denial of an interlocutory injunction within the meaning of 28 USCA 1292 (1).

Statutes Involved

28 USCA 1292 (1) (Judicial Code):

> "*Interlocutory decisions.*
>
> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, * * * ".

9 USCA 3 (U. S. Arbitration Act):

> "*Stay of proceedings where issue therein referable to arbitration.*

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Statement

The action herein is brought in equity for an accounting of the profits of a joint venture between respondent and petitioner (R. 6-13). The agreement between the respondent and petitioner concerning the said joint venture is in writing and is annexed to the complaint in the action (R. 14-21). The action was commenced by respondent in the Supreme Court of the State of New York, County of New York, and was removed at the instance of petitioner on the ground of diversity of citizenship to the United States District Court for the Eastern District of New York (R. 3). Petitioner, the defendant in the said action, served no answer or other pleading (R. 3), but instead made a motion for a stay of the action pursuant to 9 USCA 3 upon the alleged ground that the written agreement provided for arbitration of the matters in dispute (R. 2, 5). The District Court held there was no agreement to arbitrate (R. 21-22) and made an order denying petitioner's application for such stay (R. 5-6), from which order petitioner appealed to the United States Court of Appeals for the Second Circuit (R.

4). The Court of Appeals dismissed petitioner's appeal on the ground that the said order denying petitioner's application for a stay was not appealable (R. 22).

Summary of Argument

(1) The stay involved herein was intended to operate within the action in which it was sought and, therefore, failed to comply with the rule which requires that a stay operate against *another action* than the one in which it is sought in order to constitute an appealable injunction.

(2) The action herein being in equity and not at law, the stay does not qualify as an injunction under the *Enelow* and *Shanferoke* decisions, which require that the stay be based upon an equitable defense to an action of law and be directed against the latter, so as to support the concept of two actions, one staying another, within the above-stated rule.

ARGUMENT

I.

The Order Involved Herein Failed to Constitute the Denial of an Injunction, Since the Stay Was Intended to Operate Within the Action in Which It Was Sought and Was Not Directed at Another Action

Petitioner's contention is that the order denying its motion for a stay constituted the denial of an "injunction" and is appealable under 28 USCA 1292(1), which authorizes appeals from orders granting or denying "injunctions." It, therefore, becomes important at the outset to

ascertain the difference between a stay and an injunction. That difference has been firmly and clearly defined by a long line of decisions, and is well stated in *Emery* v. *Central Trust & Safe Deposit Co.*, 204 F. 965, 968, as follows:

> "We think an order refusing a stay of proceedings, made in a case other than that in which the stay is operative, amounts to a denial of an injunction, under the section invoked, but that an order refusing a stay, made in the case in which the desired stay would operate, would not amount to such denial of injunction."

Thus, it becomes clear that a stay does not amount to an injunction unless it reaches out of the action in which it is granted and stops proceedings in *another action.* That point appears to have been recognized as early as 1855 in the English case of *Croker* v. *Tempest*, 7 M. & W. 502. Decisions in recent years to the same effect are *United States* v. *Horns* (CA 2) (1945) 147 F. 2d 57, 60; *Cover* v. *Schwartz* (CA 2) (1940) 112 F. 2d 566; *Mottolese* v. *Preston* (CA 2) (1949) 172 F. 2d 308; *Dowling Bros. Distilling Co.* v. *United States* (CA 6) (1946) 153 F. 2d 353, 356; cert. den. 328 U. S. 848. In the last-named case it was said:

> "It is only when the power possessed by a court of equity is exercised to stay proceedings in another cause that such action amounts to a grant or refusal of an injunction."

In the case at bar, the stay sought by petitioner was to apply merely to the immediate action—the action in which the stay was sought—and not to another action. Accordingly, under the rule above the denial of petitioner's stay failed to amount to a denial of an injunction.

The above rule was applied by this Court to a special state of facts which permitted the concept that two separate actions—one at law and one in equity—were pending within the framework of a single case, so that a stay based upon an equitable defense to an action at law and directed against the latter was deemed a stay of "another action" within the said rule—and hence an injunction (*Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379; *Shanferoke C. & S. Corp.* v. *Westchester S. Corp.*, 293 U. S. 449).

The *Enelow* case involved an action at law to recover the proceeds of an insurance policy, to which the defendant interposed an equitable defense that the policy had been procured by fraud. The defendant then requested a trial of the equitable issues set up by its special defense in advance of the trial by a jury at law of the legal issues, pursuant to former Section 274b of the Judicial Code, which authorized the interposition of equitable defenses in an action at law and provided that "the defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea." The District Court granted the defendant's petition, the plaintiff appealed, and upon affirmance by the Court of Appeals this Court granted *certiorari*.

This Court, Chief Justice Hughes writing the decision, held that on the basis of the above-quoted language of former Section 274b and upon "the established distinction between 'proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity' ", the equitable defense interposed to the action at law constituted the equivalent of a separate bill in equity

and, therefore, a court of equity was staying another court of law and enjoining the latter's proceeding.

The *Enelow* decision made it clear that if the stay was not issued by a court of equity, or if it did not operate against an action at law, it would not amount to an injunction, because it would not support the fiction of one action staying another. Mr. Justice Hughes stated (293 U. S. at p. 382): "The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of § 129," (and at p. 383): "It is thus apparent that when an order or decree is made under § 274b requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the Court had acted upon a bill of complaint in a separate suit for the same purpose."

The *Shanferoke* case, decided at the same time as *Enelow*, involved substantially the same special state of facts as presented by Enelow. In *Shanferoke* the action was at law to recover damages for breach of contract, to which the defendant by answer set up a special equitable defense based upon an arbitration agreement, and then made a motion to stay the action, pursuant to 9 USCA 3, until the arbitration should be had. The Court, expressly stating that its decision was based on the theory it had evolved in *Enelow*, held that the denial of defendant's motion for a stay was equivalent to the denial of an injunction (293 U. S. at p. 452): 'For the reasons stated in

Enelow v. *New York L. Ins. Co.* * * * an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274b, U. S. C. title 28, § 398, is appealable under § 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of § 274b; and that the motion for a stay is an application for an interlocutory injunction based on the special defense."

Thus, in *Shanferoke,* this Court merely held that the arbitration stay in that case amounted to an injunction because, as in *Enelow,* it was directed against an action at law in furtherance of an equitable defense pleaded in the answer; and it seems plain from *Shanferoke* that if the arbitration stay, like any other stay, was sought under a state of facts which did not come within the *Enelow* concept, it would fail to constitute an injunction.

The precise limitations of the *Enelow* and *Shanferoke* decisions were emphasized in a decision made by this Court two months later in *Schoenamsgruber* v. *Hamburg Amer. Line,* 294 U. S. 454, which also involved the question of the appealability of an arbitration stay pursuant to 9 USCA 3. The action was in admiralty to recover damages for personal injuries incurred on defendant's steamship, and the answer set up a special defense that the contract of passage required the arbitration of all claims. The District Court granted defendant's motion for an order pursuant to 9 USCA 3 staying the action pending arbitration. The Court of Appeals dismissed the appeal from the order granting the stay, holding the same to be interlocutory and not appealable, and this Court granted *certiorari.* This Court

affirmed the holding of the Court of Appeals, pointing out (294 U. S. at p. 457) that neither *Enelow* nor *Shanferoke* was applicable, since each of the latter cases "was an action at law in which the defendant by answer sought equitable relief" and in each case "the order held appealable stayed proceedings on the law side and operated as an injunction * * * against proceedings in another court," whereas the *Schoenamsgruber* action was in admiralty. The *Schoenamsgruber* decision also pointed out (pp. 457-8) that admiralty courts "do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions."

Enelow and *Shanferoke,* if not implicity overruled by *Morgantown* v. *Royal Ins. Co.,* 337 U. S. 254, at least have had their precise limitations further emphasized by the latter decision. The *Morgantown* case involved the reverse of the *Enelow* situation. The *Morgantown* action was in equity and not at law (to revoke an insurance policy), and the counterclaim was at law and not in equity (to recover the proceeds of the policy). The defendant's motion, based on the legal counterclaim, for a jury trial of the action, was denied by the District Court, and defendant's appeal from the order denying its said motion was dismissed by the Court of Appeals as non-appealable, and this Court granted *certiorari.* In addition to the leading opinion in *Morgantown* affirming the ruling of the Court of Appeals, the language of Mr. Justice Frankfurter in his separate opinion concurring with the majority, makes plain the precise limitations of *Enelow* and, therefore, *Shanferoke* (337 U. S. at pp. 260-1):

> "The facts, therefore, are precisely the opposite of those in the *Enelow* Case. Here there was no inter-

vention by a court of equity in proceedings at law, but 'a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.' 293 U. S. at 381, 382." • • •

"A layman may see no difference between the postponement by a trial judge of an action at law, and the postponement of such an action by an equitable proceeding resulting in an interlocutory injunction. But the Congress has seen fit to allow an appeal from one such result and not from the other. Non-appealability of intermediate orders in the federal courts has been a deep-rooted general principle limiting those courts since their establishment. A very few types of interlocutory orders are appealable.

"The *Enelow* and *Ettelson* Cases presented an order that was appealable because it was a stay by a court of equity of a common-law action. This is not such a stay, and in affirming the judgment the Court leaves Enelow and Ettelson untouched."

The requirement that the action be at law is necessary to a case seeking to come within the *Enelow* concept that two separate actions—two sides of a court—are operating, one against the other, under the caption of a single case. Aside from the fact that both *Enelow* and *Shanferoke* were rationalized on the basis of former section 274b of the Judicial Code, which applied only to actions at law wherein equitable defenses or cross-bills were interposed, it further remains that an injunction may be granted only by a court of equity "in the enforcement of equitable principles" and "exercising what is essentially an equitable jurisdiction (293 U. S. at pp. 382-383)." Since an injunction may be

granted only in equity, it must be directed against the other side of the court—the law side—to permit the legal fiction that there are two actions present and that one is staying the other. If the action itself is in equity, and if the defense upon which the stay is based also is equitable, then there is only one indivisible action and no basis whatever for the legal fiction, necessary to *Enelow* and *Shanferoke*, of two actions, one operating against the other.

The action herein being in equity and not at law prevents the case at bar from coming within the *Enelow* and *Shanferoke* decisions. Petitioner's brief does not dispute, and its argument implicitly concedes, that the action herein is in equity. In any event, there should be no question that the action herein, for an accounting of the profits of a joint venture between respondent and petitioner, *is in equity* and not at law. *Valdes* v. *Larrinaga*, 233 U. S. 705, 709; *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130, 134; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514-515. Rule 2 of the Rules of Civil Procedure removed some of the *procedural* distinctions between actions at law and those in equity, but the substantive distinctions between equitable and legal actions still stand (*Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368.

Petitioner implies that the requirement of *Enelow* and *Shanferoke*, that the action be one at law, should be disregarded as overly-technical. However, it was of just such technicalities that *Enelow* and *Shanferoke* were made, since without them there could not be created the concept necessary to said decisions, of two actions being present—one staying the other.

Petitioner appears anxious to dispose of *Enelow* by critically referring to it as creating a "fictional injunction"

and as having been set aside by *Morgantown*. However, whatever the merits or demerits of *Enelow* may be, it should be understood that respondent's position does not depend in any way upon *Enelow*. *Enelow* was merely engrafted upon the basic rule that a stay cannot qualify as an injunction unless it stays *another action*, and the passing of *Enelow* would leave intact that basic rule, which we contend is controlling herein.

Petitioner's attempt to rest its case upon *Shanferoke*, while seeking to have *Enelow* disregarded, must fail, since *Shanferoke* was expressly and completely based upon *Enelow* (293 U. S. at p. 452) and therefore would fall with *Enelow*. In any event, petitioner's stay does not come within either decision.

Therefore, the fact that the action herein is in equity, and not in law, renders *Enelow* and *Shanferoke* inapplicable and brings this case under the basic rule that a stay does not amount to an injunction unless it is directed at *another action* than the one in which it is granted.

II.

Answering Other Contentions of Petitioner

Petitioner stresses the fact that the decision of *Hudson Lumber Co.* v. *U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, conflicts with the judgment of the Court of Appeals dismissing petitioner's appeal. An examination of the *Hudson Lumber Co.* case shows that the action stayed pursuant to 9 USCA 3 was in equity and not at law. However, the said decision fails completely to show upon what basis or by what process of reasoning the Court of Appeals for the

Ninth Circuit arrived at its perfunctory conclusion that the stay in that case was appealable as an injunction. It merely cited in the footnote (181 F. 2d at p. 930) the *Enelow* and *Shanferoke* cases and decisions of the Court of Appeals, *in all of which the actions sought to be stayed were at law.* The *Hudson Lumber* decision, therefore, appears to be based upon a misunderstanding of the *Enelow* and *Shanferoke* decisions and the other cases cited in its footnote, which misunderstanding may have been contributed to by the fact that no issue was raised in that case as to the jurisdiction of the appeal, jurisdiction having been perfunctorily conceded in appellee's brief. With the exception of the said *Hudson Lumber* case, we have found none in which a stay was deemed to come within the *Enelow* or *Shanferoke* cases, unless the action was at law. Thus, in *International Union* v. *Colonial Hardwood,* 168 F. 2d 33, *American Locomotive Co.* v. *Chemical Research Corp.,* 171 F. 2d 115, and *Markel Electric Prod. Inc.* v. *United Elec. Radio and Machine Workers, etc.,* 202 F. 2d 435, all cited by petitioner, each of the actions was at law to recover damages for breach of contract.

Petitioner argues that the *statutory nature* of an arbitration stay pursuant to 9 USCA 3 should differentiate it from other stays and constitute it as an injunction. However, the fact that a stay is based upon statute does not make it an injunction (*Carter* v. *Hodge,* 150 N. Y. 532, 537; *Thompson* v. *Savarosa Realty Corp.,* 73 N. Y. S. 2d 809). *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.* (CA 2) 126 F. 2d 978, 987, disputes the existence of any such differentiation, stating that an arbitration stay pursuant to 9 USCA 3 is "merely a stay order of a kind long familiar in common law, equity and admiralty actions." The *Schoen-*

amsgruber decision says of arbitration stays: "And plainly, so far as concerns appealability, they are not to be distinguished from an order postponing trial of an action at law to await the report of an auditor (294 U. S. at p. 457).

Petitioner's contention that an arbitration stay is possessed of some unexplained qualities which constitute it an injunction *per se*, is expressly refuted by both the *Shanferoke* and *Schoenamsgruber* decisions. In *Shanferoke*, the arbitration stay was held appealable as an injunction only because the facts there came within the *Enelow* concept, since the stay was based on an equitable defense to an action at law and was directed against the latter, thereby staying *another action*. In the *Schoenamsgruber* case, however, the *Enelow* concept of two actions was lacking, since the action was in admiralty and not at law, and the stay was not based on equitable jurisdiction, and hence could not be deemed a stay of *another action*. Thus, *Schoenamsgruber*, like *Enelow* and *Shanferoke*, recognized and upheld the basic rule that an arbitration stay, like any other stay, does not constitute an injunction unless it is directed at *another action* than one in which it is granted.

Petitioner's argument that the arbitration stay should be deemed an injunction because it would have stayed the instant action in favor of the outside arbitration proceedings is precisely the reverse of the rule. As shown at the outset, the function of an injunction is to reach out of the instant action and stay the outside proceedings. *Dowling Bros. Distilling Co.* v. *United States* (CA 6) 153 F. 2d 353, 356 (cert. den. 328 U. S. 848) states: "It is only when the power possessed by a court of equity is exercised to stay

proceedings in another cause that such action amounts to a grant or refusal of an injunction." *Mottolese* v. *Preston, et al.* (CA 2) 172 F. 2d 308 holds that a stay which operates against the action in which it is issued pending the determination of other proceedings, is a non-appealable stay and not an injunction.

Petitioner also argues that to compel it to litigate the issues in this action because of the non-appealability prior to final judgment of the order involved herein would cause "procedural injury which could not be undone by an appeal from the final order." However, the federal appeal statutes do not authorize appeals from interlocutory orders simply because further litigation might be avoided by an appeal prior to final order. A denial of a motion to dismiss a complaint, even on jurisdictional grounds, is not reviewable before final judgment, despite the fact that an immediate review might obviate further litigation (*Catlin* v. *United States*, 324 U. S. 229, 236). The denial of a trial by jury, although highly important and involving a Constitutionally guaranteed right, does not authorize an immediate review, despite the fact that postponement of the right to appeal until final judgment may necessitate a retrial (*Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 258).

It was the intent of Congress to forbid piecemeal appeals (*Cobbledick* v. *United States*, 309 U. S. 323, 325; *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 258, 261; *Luxton* v. *North River Bridge Co.*, 147 U. S. 341; *Catlin* v. *United States*, 324 U. S. 229).

Petitioner's argument that "the function of arbitration would be defeated if the order is not immediately appealable" completely disregards the fact that the failure of

petitioner to obtain a stay of this action does not prevent it from doing anything it might have a right to do under the alleged arbitration clause. Indeed, petitioner's president, Frenkil, had the sole power to appoint the accountants to act under the said clause (R. 3, 18) and assuming *arguendo* that petitioner has any right to proceed with an arbitration, the lack of a stay cannot prevent it from doing so or from offering proof on the trial of this action of any resultant arbitral determination. A review of the final judgment can pass both upon the question of the right to arbitrate and the effect of any alleged arbitral determination upon the issues in this action.

The denial of an arbitration stay in this action has not delayed petitioner's alleged arbitration activities one iota. The stays petitioner has obtained from the District Court and this Court in connection with the question of an appeal from the order denying an arbitration stay, have stayed proceedings in this action for a period of approximately one year, during which petitioner could have conducted any alleged arbitration many times over if arbitration had been petitioner's purpose.

Petitioner's argument that respondent's selection of an equitable form of action instead of one at law deprives petitioner of a right of appeal (by preventing it from coming within the *Enelow* concept) ignores two facts: (1) That the allegations of the complaint show that the plaintiff could not have adequately established the rights and damages to which he was entitled without an equitable accounting (R. 9-13); (2) that if petitioner's motion for an arbitration stay had been granted instead of denied, respondent would have no right to appeal.

Conclusion

The order involved herein fails to constitute the denial of an interlocutory injunction within the meaning of Section 1292(1) of the Judicial Code. It is, therefore, respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

CHARLES WILSON,
Attorney for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1954

No 31

BALTIMORE CONTRACTORS, INC.,
Petitioner,

—vs.—

JACOB BODINGER,
Respondent.

RESPONDENT'S REBUTTAL TO PETITIONER'S REPLY BRIEF.

I.

Petitioner's reply brief erroneously describes Respondent's position as being based on the "assumption that there is only one method (equitable defense in an action at law), by which an injunction may issue to restrain the prosecution of an action".

To the contrary, when the stay complies with the basic rule defining an appealable injunction (see Respt.'s main brief, p. 5) and stays another action—an action separate from the one in which the stay is sought—it makes no difference whether the action sought to be stayed is at law or in equity.

The distinction becomes important only where the stay does not comply with the said basic rule, but is claimed to qualify as an injunction under the *Shanferoke* decision (and

its prototype, *Enelow*), since in those decisions the concept that two actions are present and one is staying the other, is merely a legal fiction. The requirement of the *Enelow* concept that the action sought to be stayed be one at law is fully discussed in Respondent's main brief, particularly at pages 10-11.

II.

Petitioner's reply brief also argues that "a Section 3 Arbitration Act order is injunctive in substance". However, the authorities are quite to the contrary:

1. *Enelow* holds that an injunction may be granted only by a court of equity "in the enforcement of equitable principles" and "exercising what is essentially an equitable jurisdiction" (203 U. S. at pp. 382-3). But a stay granted pursuant to Section 3 is not inherently equitable in nature. In *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 987, the Court said:

> "However that may be, the same equitable considerations should surely not be applicable when a defendant asks a stay pursuant to Section 3. For he is not then seeking specific performance (i.e., an order requiring that the parties proceed to arbitration) but merely a stay order of a kind long familiar in common law, equity and admiralty actions. His position is that when the court (to quote Section 3) is 'satisfied that the issue involved in such suit * * * is referable to arbitration,' the court must 'stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.' There is well recognized distinction between such a stay and specific performance: The first merely arrests further action by the court itself in the suit until something outside the suit has occurred; but the court does not order that it shall be done. The second, though, the exer-

cise of discretionary equity powers, affirmatively orders that someone do (or refrain from doing) some action outside the suit."

American Locomotive Co. v. Chemical Research Corp., 171 F. 2d 115, 122, held that the granting or denial of such an arbitration stay does not involve the exercise of the *discretion*, which is essential to the consideration of an injunction or any other form of equitable relief.

2. The *Schoenamsgruber* decision established that a court of admiralty, although it lacks general equitable jurisdiction and does not grant injunctions except in limitation of liability proceedings, nevertheless has the power to grant an arbitration stay under Section 3 (294 U. S. at pp. 457-8).

3. The *Shanferoke* decision upon which Petitioner relies did not hold the arbitration stay to constitute an injunction because of any inherent or substantive qualities, but only "for the reasons stated in Enelow", the order there reviewed being "an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274b" (293 U. S. at p. 452).

Indeed, an examination of the statute (9 U. S. C. A. 3) reveals nothing which would make an arbitration stay *per se* an appealable injunction. To the contrary, the statute precludes the exercise of any equitable considerations and makes the granting or denial of the stay dependent solely upon whether or not the Court is "satisfied that the issue involved in such suit * * * is referable to arbitration".

Respectfully submitted,

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